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ABSTRACT

Judicial decisions affecting educational policy and management that were handed down in 1985 by state appellate courts and federal courts are summarized and analyzed in this volume. The book is divided into eight topical chapters, each written by one or more experts in education law. The chapters are "Employees" (Gail Paulus Sorenson); "Bargaining" (Charles L. Miller and Perry A. Zirkel); "Pupils" (Henry S. Lufler, Jr.); "Handicapped" (Nelda H. Cambron-McCabe); "Torts" (Richard S. Vacca and William J. Evans, Jr.); "Business" (Steven M. Goldblatt); "Finance" (Richard A. Rossmiller); and "Higher Education" (Robert M. Hendrickson). The book includes a 17-page alphabetical index of the more than 1,000 cases cited in the text as well as a 9-page subject index. (PGD)

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CONTENTS

1 EMPLOYEES

Gail Paulus Sorenson

Introduction / 2
Discrimination in Employment / 2
- Race / 3
- Religion / 5
- Sex / 6
- National Origin / 7
- Age / 7
- Handicap / 8

Substantive Constitutional Rights / 8
- Speech / 9
- Association / 11
- Religion / 11
- Privacy / 12
- Substantive Due Process / 12

Procedural Due Process / 13
- Liberty and Property Interests / 14
- Aspects of Notice / 15
- Aspects of Hearing / 16

Dismissal, Nonrenewal, and Discipline / 17
- Insubordination / 17
- Unprofessional Conduct, Unfitness, Willful Neglect of Duty / 18
- Immorality / 19
- Incompetence / 19
- Compliance with School Board Policies and State Statutes / 20

Reduction-in-force and Involuntary Leaves of Absence / 22
- Necessity for Reduction-in-force / 23
- Elimination of Position / 23
- Selection of Employee / 24
- Realignment / Reassignment / 24
- Call-back Rights / 26

Contractual Disputes / 27
- Board Policies and Contract Stipulations / 27
- Administrative Regulations and Statutory Provisions / 28

Tenure / 29
- Tenure Status / 30
- Tenure by Default or Acquiescence / 31

Certification / 32

Certification Standards / 32
Decertification, Revocation, or Suspension / 33

2 BARGAINING

Charles L. Miller and Perry A. Zirkel

Introduction / 35
Constitutional Issues / 35
Authority to Bargain / 38
Recognition and Representation Issues / 39
Unit Determination / 39
Supervisory, Managerial, and Confidential Employees / 39
Other Representation and Recognition Issues / 39
Elections / 41
Rights and Obligations of Exclusive Bargaining Representatives / 41
Union Rights / 41
Union Security / 42
Obligations of Exclusive Representatives / 43
Scope of Bargaining / 44
Duty to Bargain / 44
Mandatory Topics of Bargaining / 45
Prohibited Topics of Bargaining / 46
Permissive Topics of Bargaining / 46
Grievability and Arbitrability / 47
Presumption of Arbitrability / 47
Who Determines? / 51
Procedural Issues / 51
Management Prerogatives as a Bar / 53
General / 54
Judicial Review / 55
Arbitration Awards and Employment Relations Board Rulings / 55
Standard of Review / 55
Propriety of Awards / 57
Statute-based Claims / 59
Interpretation of Collective Bargaining Legislation / 59
Interrelationship with Other Laws / 60
Impasse and Dispute Resolution / 62
Fact Finding and Arbitration / 62
Rights on Expiration of Contracts / 63
Concerted Activity / 64

Strikes and Other Job Actions / 64
Miscellaneous Decisions / 66
Conclusion / 68

3 PUPILS

Henry S. Lufler, Jr.

Introduction / 69
Public School Assignment, Tuition, and Transportation / 70
Tuition and Assignment / 70
Transportation / 74
Compulsory Attendance / 75
Bilingual-Bicultural Programs / 82
Private and Parochial Schools / 83
School Sports / 86
State Athletic and Activity Associations / 86
Discrimination and School Sports / 89
Substantive Rights of Students / 90
Search and Seizure / 90
First Amendment Religious Rights / 94
First Amendment Freedom of Expression / 101
Sanctions for Student Misconduct / 105
Suspensions and Expulsions / 105
Corporal Punishment / 109
Testing and Placement / 109
Desegregation / 111
Systemwide Remedies / 112
Cross-district Remedies / 112
Desegregation Plan Oversight / 115
Attorney Fees / 119

4 HANDICAPPED

Nelda H. Cambron-McCabe

Introduction / 122
Procedural Safeguards / 123
Evaluation / 123
Change in Placement / 124
Burden of Proof / 124
Placement During Due Process Proceedings / 124
Exhaustion of Administrative Remedies / 125

Placement / 127
Least Restrictive Environment / 127
Private Facilities / 128
Related Services / 132
Discipline / 133
Remedies / 134
Damages / 134
Attorney Fees / 134
Eleventh Amendment Immunity / 138
State Laws / 141
Discrimination Under the Rehabilitation Act, Section 504 / 143
Students / 143
Employees / 144

5 TORTS

Richard S. Vacca and William J. Evans, Jr.

Introduction / 146
Negligence / 147
Student Injuries / 148
School Settings During School Hours / 148
En Route to and from School / 152
School Buildings and Grounds / 153
School-related Activities / 154
Educational Malpractice / 155
Negligence Defenses / 157
Immunity / 157
Common Law (Governmental Immunity) / 157
Statutory Immunity / 160
Other Defenses / 162
Assumption of Risk / 162
Comparative Negligence / 163
Notice of Claim / 164
Liability Insurance / 165
Employee Injuries / Workers' Compensation / 168
Assault and Battery / 168
Defamation / 169
Tortious Interference with a Contract / 170
Products Liability / 172
Constitutional Torts / 173

6 BUSINESS

Steven M. Goldblatt

Introduction / 175
State Agencies / 175
School Board Authority / 176
    Bids / 176
    Contracts / 176
    General / 176
School Board Meetings / 177
School Board Elections and Recall / 177
    Voting / 177
    Elections / 177
    Recall / 178
Student Transportation / 178
Desegregation / 178
Real Property / 179
    Boundaries / 179
    Attachment and Detachment / 179
    Eminent Domain / 180
    Zoning / 180
    Development / 181
    Roads / 181
    Property Taxes / 182
    Property Sales and Leases / 183
    Utilities / 183
Building Design and Construction / 184
    Bonds / 184
    Funding / 184
    Competitive Bids / 185
    Prevailing Wages / 185
    Roofs / 185
    Asbestos / 186
    Design and Performance / 187
    Architect Fees / 187
    Contractor Claims / 187
    Arbitration / 188
Facility Maintenance, Operation, and Use / 189
    Use of Facilities / 189
    Personal Injuries / 189
    Property Crimes / 190
School Closures / 191
Higher Education / 191

State Agencies / 191
Board Authority / 191
Desegregation / 192
Real Property / 192
Building Design and Construction / 193
Facility Maintenance, Operation, and Use / 193

7 FINANCE

Richard A. Rossmiller

Introduction / 195
Public Funds for Private Schools / 195
Transportation / 200
Sources and Allocation of Funds / 201
State School Finance Programs / 201
Funds for Special Education / 206
Federal Funds for Education / 210
School Tax Issues / 214
Power to Tax / 214
Relationship of School Districts to Other Government Units / 220
Uses of School Revenues / 224

8 HIGHER EDUCATION

Robert M. Hendrickson

Introduction / 227
Intergovernmental Relations / 227
Employees / 232
Discrimination in Employment / 232
Title VI / 233
Title VII / 233
The Equal Pay Act / 240
Title IX / 242
Age Discrimination in Employment / 242
Rehabilitation Act of 1973 / 243
Hiring Discrimination / 244
Nontenured Faculty / 244
First Amendment Freedom of Speech / 245
Nonrenewal Procedures / 245
Part-time Faculty / 248
Tenured Faculty / 249

Termination for Cause / 249
Denial of Employee Privileges / 252
Termination Due to Financial Exigency or Program Elimination / 253
Denial of Employee Benefits / 254
Administration and Staff / 256
Collective Bargaining / 258
Sexual Harassment of Employees / 260
Students / 261
Admissions / 261
Nonresident Tuition / 263
Financial Aid / 264
First Amendment / 267
Freedom of Speech / 267
Freedom of Expression / 268
Dismissal / 269
Disciplinary Dismissal / 269
Academic Dismissal / 271
Other Constitutional Privileges / 272
Liability / 274
Personal Injury / 274
Workers Compensation / 275
Contract Liability / 277
Deceptive Practices / 279
Educational Malpractice / 280
Negligence / 281
NCAA Regulations and Sanctions / 281
Antitrust / 282
Table of Cases / 284
Index / 301

1

EMPLOYEES

Gail Paulus Sorenson

Introduction / 2
Discrimination in Employment / 2
- Race / 3
- Religion / 5
- Sex / 6
- National Origin / 7
- Age / 7
- Handicap / 8

Substantive Constitutional Rights / 8
- Speech / 9
- Association / 11
- Religion / 11
- Privacy / 12
- Substantive Due Process / 12

Procedural Due Process / 13
- Liberty and Property Interests / 14
- Aspects of Notice / 15
- Aspects of Hearing / 16

Dismissal, Nonrenewal, and Discipline / 17
- Insubordination / 17
- Unprofessional Conduct, Unfitness, Willful Neglect of Duty / 18
- Immorality / 19
- Incompetence / 19
- Compliance with School Board Policies and State Statutes / 20

Reduction-in-force and Involuntary Leaves of Absence / 22
- Necessity for Reduction-in-force / 23
- Elimination of Position / 23
- Selection of Employee / 24
- Realignment / Reassignment / 24
- Call-back Rights / 26

Contractual Disputes / 27
- Board Policies and Contract Stipulations / 27
- Administrative Regulations and Statutory Provisions / 28

Tenure / 29
- Tenure Status / 30
- Tenure by Default or Acquiescence / 31

Certification / 32
Certification Standards / 32
Decertification, Revocation, or Suspension / 33

INTRODUCTION

This chapter reviews over 250 judicial decisions reported in 1985 concerning the legal rights of precollegiate, public-sector education employees. Cases dealing with salary and similar employment and unemployment benefits, criminal cases, and cases focusing on purely procedural issues have been omitted. Tort cases involving employees and those dealing with collective bargaining are found in other chapters of the *Yearbook*.

DISCRIMINATION IN EMPLOYMENT

Employment discrimination cases can be judicially reviewed pursuant to the equal protection clause of the United States Constitution, similar state constitutional provisions, or a variety of federal and state civil rights provisions. Most employment discrimination cases, however, are brought under title VII of the Civil Rights Act of 1964,[1] which prohibits employment discrimination because of a person's race, color, religion, sex, or national origin. Discrimination on the basis of age, for those individuals between the ages of forty and seventy, is prohibited by the federal Age Discrimination in Employment Act of 1975 (ADEA),[2] and discrimination against "otherwise qualified handicapped individuals" is prohibited under section 504 of the Rehabilitation Act of 1973.[3]

Of the two types of title VII cases, those alleging discriminatory treatment are more common than those alleging that some action or policy, although neutral on its face, has a discriminatory impact on a protected class of individuals. In order to prove discrimination, a plaintiff must first demonstrate a *prima facie* case of discrimination: that the plaintiff was burdened because of race, color, religion, sex, or national origin, or that some policy or practice burdens persons of the plaintiff's class. The employer then must "articulate some legitimate,

1. 42 U.S.C. § 2000 *et seq.*
2. 42 U.S.C. § 1601 *et seq.*
3. 29 U.S.C. § 794 *et seq.*

nondiscriminatory reason" for the employee's treatment[4] or must demonstrate by clear and convincing evidence the job-relatedness of the practice or policy that has a discriminatory impact on a class of individuals.[5] If the employer is successful, the employee still has an opportunity to rebut the employer's contention and prove by a preponderance of the evidence that discrimination is the motive (in discriminatory treatment cases) or the effect (in discriminatory impact cases).

Race

The Seventh Circuit has said that, when alleging race discrimination, public employees have a choice between bringing the case under title VII, with its requirement of the exhaustion of administrative remedies, or the equal protection clause. Where the facts of the case would indicate a violation of title VII, the employee nevertheless has an independent right to be free of discrimination under the Constitution.[6] Another case illustrating the flexibility of procedural remedies for alleged race discrimination arose under section 1981 of the Civil Rights Act of 1866,[7] which prohibits both public and private discrimination in the making of contracts. Where a black female teaching assistant alleged discrimination arising out of the failure to promote her to the position of teacher, the court applied the same principles regarding the order of presentation of evidence and burden of proof as are applicable in title VII discriminatory treatment cases.[8] Under either statute, the plaintiff must prove by a preponderance of the evidence that the defendant was guilty of intentional discrimination on the basis of race.

Although failure to make out a *prima facie* case of racial discrimination is rare in reported cases, where a qualified white male applied and was rejected for a position as teacher-director of a day care center (in favor of a qualified black female), the court held that the circumstances did not suggest unlawful discrimination.[9] Citing the Supreme Court case of *Texas Department of Community Affairs v. Burdine*,[10]

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4. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
5. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
6. Trigg v. Fort Wayne Community Schools, 766 F.2d 299 (7th Cir. 1985).
7. 42 U.S.C. § 1981.
8. Love v. Special School Dist., 606 F. Supp. 1320 (E.D. Mo. 1985) (plaintiff's ultimate burden under section 1981, as in a title VII discriminatory treatment case, is to prove intentional discrimination). For applicable standards, see McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).
9. Farrell Area School Dist. v. Deiger, 490 A.2d 474 (Pa. Commw. Ct. 1985).
10. 450 U.S. 248 (1981).

the court held that a white male "must prove by a preponderance of the evidence that [he] applied for an available position for which [he] was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."[11] Where applicants included a black male, a black female, and several white females (in addition to the white male plaintiff), the circumstances did not warrant such an inference.

Typical of several controversies[12] where plaintiffs established *prima facie* cases of race discrimination, but were unable to rebut the proffered nondiscriminatory reasons for the adverse action, is a case of alleged race and sex discrimination.[13] A black female was among six finalists for a principalship; all other finalists were white males. Even though a white male was selected, the court found substantial evidence that the selection procedures were fair and that the man chosen for the position had been ranked higher on objective job criteria. (The court took note of the fact that the two black females on the selection committee favored the person who was hired.) Although the court was concerned about the lack of blacks and females in high administrative positions, it stated that this fact was not "decisive of the question of whether this plaintiff [had] been the victim of intentional discrimination."[14]

In four cases, federal appellate courts determined that district court findings of no purposeful race discrimination were not 'clearly erroneous."[15] Citing *Anderson v. City of Bessemer*,[16] the appellate courts found that they were obligated to give deference to district courts' findings of fact. Quoting *Anderson*, an appellate court said that "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of

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11. Farrell, 490 A.2d at 479, *quoting id.* at 253.

12. Love v. Alamance County Bd. of Educ., 757 F.2d 1504 (4th Cir. 1985) (promoted white males were more qualified than black female teacher); Lujan v. Franklin County Bd. of Educ., 766 F.2d 917 (6th Cir. 1985) (excellent coaching record and enthusiasm sustained finding of nondiscrimination when a white male was hired instead of a black male); Torrence v. Oxford Mun. School Dist., 615 F. Supp. 321 (N.D. Miss. 1985) (evidence of unsatisfactory performance supported discharge of black high school band director); Love v. Special School Dist., 606 F. Supp. 1320 (E.D. Mo. 1985) (failure to promote black teaching assistant to teaching position based on assistant's failure to meet objective job criteria).

13. Love v. Alabama Inst., 613 F. Supp. 436 (N.D. Ala. 1984).

14. *Id.* at 439.

15. Simmons v. Camden County Bd. of Educ., 757 F.2d 1187 (11th Cir. 1985); Patterson v. Masem, 774 F.2d 251 (8th Cir. 1985); Rogers v. Masem, 774 F.2d 328 (8th Cir. 1985); McDaniel v. Temple Indep. School Dist., 770 F.2d 1340 (5th Cir. 1985).

16. 105 S. Ct. 1504 (1985). *See also* Fed.R.Civ.P. 52(a).

fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous."[17] It is unlikely, therefore, that discrimination claims that are unsuccessful at trial will be reversed on appeal, for other than legal reasons.

The final case in this subsection is illustrative of the relatively rare claim of "reverse discrimination." In a large city school district, white teachers alleged that layoffs made pursuant to a negotiated agreement protecting the jobs of recently-hired minority teachers violated title VII and deprived the white teachers of equal protection under the Constitution.[18] Holding that race-conscious plans were not per se violations of these provisions, the court then considered the two allegations separately. Because a government body determined that hiring discrimination existed in the past and because the plan did not "unnecessarily trammel the interests of the white employees"[19] (i.e., it was a temporary provision, it did not require the replacement of white teachers by newly-hired black teachers, it did not absolutely prevent advancement by whites, etc.), the court determined that title VII was not violated. Likewise, the no-minority-layoff provision did not violate the equal protection clause. It served "the substantial and important interest of remedying the effects of discrimination" because it preserved the district's recent gains in minority hiring. If the provision had not been used, a quarter of the district's black teachers would have been laid off. With regard to the interests of the white teachers, the court pointed out that the lay-off provision did not stigmatize laid-off white teachers nor require that quality be ignored and, most importantly, it was voluntarily agreed to by the teachers union.

Religion

In a case involving alleged discrimination with respect to compensation, terms, conditions, or privileges of employment under title VII, a federal appellate court found that plaintiff had established a *prima facie* case of discrimination based on religion.[20] The case was remanded for a determination of whether a policy permitting three paid leave days for religious reasons, but not allowing additional personal leave days to be used for religious purposes, violated the federal

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17. Rogers v. Masem, 774 F.2d 328, 332 (citations omitted).
18. Britton v. South Bend Community School Corp., 775 F.2d 794 (7th Cir. 1985).
19. *Id.* at 805, *citing* United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).
20. Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476 (2d Cir. 1985).

statute. The court said that the title VII obligation to accommodate religion (unless such accommodation causes undue hardship) would require an employer to prefer the employee's accommodation proposal, if reasonable, to that of the employer.

Sex

In the 1985 cases reviewed here, females generally were unsuccessful in attempts to prove sex discrimination. Where school district policy denied extended leaves of absence to males and females alike, it was determined that a denial of preresignation seniority credit to a female who, for reasons of pregnancy and child-rearing, had resigned and been rehired twice, was not discriminatory.[21] In addition to unsuccessful claims based on race as well as sex,[22] females also were unsuccessful in three cases where they failed to prove that employers' reasons for adverse employment decisions were pretextual.[23] A case which illustrates the difficulty of proving discrimination concerned an elementary school instructional media director who was unsuccessful in her bid for the nearly identical job at the district's junior-senior high school.[24] Even though the court found that it was "uncontroverted that objectively [she] was the better qualified," selection of a male junior high language arts instructor, who was a strong disciplinarian, was upheld because employers are not "required to hire the best objectively qualified person. . . . So long as discrimination is not the motive behind the selection, even a poor choice should not be judicially rejected."[25]

Plaintiffs were successful in two New York cases where state-level administrative determinations of discrimination were found to be supported by substantial evidence;[26] compensatory damages of $5,000 were allowed in each case for mental anguish. In another case, admin-

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21. Daly v. Three Village Cent. School Dist., 486 N.Y.S.2d 286 (N.Y. App. Div. 1985).

22. Love v. Alamance County Bd. of Educ., 757 F.2d 1504 (4th Cir. 1985); McDaniel v. Temple Indep. School Dist., 770 F.2d 1340 (5th Cir. 1985); Patterson v. Masem, 774 F.2d 251 (8th Cir. 1985); Love v. Alabama Inst., 613 F. Supp. 436 (N.D. Ala. 1985).

23. Record v. Mill Neck Manor Lutheran School, 611 F. Supp. 905 (E.D.N.Y. 1985); Board of Educ. v. Human Rights Comm'n, 481 N.E.2d 994 (Ill. App. Ct. 1985); Shapiro v. Community School Dist., 490 N.Y.S.2d 590 (N.Y. App. Div. 1985).

24. Board of Educ. v. Human Rights Comm'n, 481 N.E.2d 994 (Ill. App. Ct. 1985).

25. *Id.* at 997.

26. Board of Educ. v. McCall, 485 N.Y.S.2d 357 (N.Y. App. Div 1985); Board of Educ. v. State Div. of Human Rights, 486 N.Y.S.2d 469 (N.Y. App. Div. 1985).

istrative determinations of discrimination and retaliatory discharge were deemed relevant to a section 1983 civil rights claim.[27] And in two cases arising out of the same fact pattern, a school district policy of coupling teaching positions with football coaching responsibilities was held to have a discriminatory effect that was not justified by business necessity;[28] in addition, a female plaintiff received over $100,000 in back pay and "front pay" until afforded a full-time teaching position with the district.[29]

National Origin

Title VII, which prohibits discrimination based on national origin but not alienage (which is therefore relegated to constitutional protection), was the subject of two national origin cases reported in 1985. In the first, an elementary school librarian of Asian origin was not rehired because young children had difficulty understanding her; additionally, the superintendent's recommendation that she be appointed to a position in the junior high school was rejected by the board.[30] Because difficulty in communicating was a "feigned contention" *vis a vis* the junior high school position, the plaintiff was ordered reinstated. In the second, defendant school district's motion to dismiss was denied when a federal district court held (citing federal administrative determinations) that discrimination against an employee because of the employee's *association* with people of Hispanic national origin is prohibited by title VII.[31]

Age

Applying title VII standards to the Age Discrimination in Employment Act (ADEA)[32] (and a similar state statute), a New Jersey court held that a negotiated salary schedule, which had an incidental negative impact on older workers, did not violate federal or state law in the absence of intentional discrimination.[33] Also unsuccessful were

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27. McClure v. Mexia Indep. School Dist., 750 F.2d 396 (5th Cir. 1985).
28. Civil Rights Div. v. Amphitheater Unified School Dist. No. 10, 693 P2d 342 (Ariz. Ct. App. 1983).
29. Civil Rights Div. v. Superior Court, 706 P2d 745 (Ariz. App. 1985).
30. Mandhare v. W.S. LaFargue Elementary School, 605 F. Supp. 238 (E.D. La. 1985).
31. Reiter v. Center Consol. School Dist., 618 F. Supp. 1458 (D. Colo. 1985).
32. 29 U.S.C. § 623(a).
33. Giammario v. Trenton Bd. of Educ., 497 A.2d 199 (N.J. Super. Ct. App. Div. 1985).

complaints on behalf of a teacher and bus driver against forced retirement.[34]

Handicap

Three cases reported in 1985 alleged discrimination against a custodian and two bus drivers under state law.[35] In addition, two cases alleged discrimination under section 504 of the Rehabilitation Act of 1973.[36] In the first section 504 case, a visually handicapped applicant for a position as a school librarian was unable to prove that she was an "otherwise qualified" handicapped individual or that she was denied employment solely because of her handicap.[37] An Eleventh Circuit case was remanded for consideration of whether a long-time teacher who was susceptible to tuberculosis was "otherwise qualified" or could reasonably be accommodated.[38] Rejecting the lower court's summary finding of no discrimination, the appellate court held (1) that the school district was subject to section 504 by virtue of its receipt of federal impact aid, (2) that a person who either has or has had a contagious disease is "handicapped" under federal law, and (3) that a "careful and informed weighing" of the factual issues of legitimate physical qualification and potential accommodation was required.

SUBSTANTIVE CONSTITUTIONAL RIGHTS

Cases reviewed in this section concern freedom of speech, association, and religion; the right to privacy; and substantive due process, where the allegation is that some state policy or action is arbitrary, capricious, or unfair rather than a violation of procedural regularity (procedural due process). As in prior years, free speech cases predominate.

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34. Equal Employment Opportunity Comm'n v. Fox Point-Bayside School Dist., 772 F.2d 1294 (7th Cir. 1985) (forced retirement at age 65 protected by a delay provision in an amendment to the AEDA); Ten Hoeve v. Board of Educ., 489 N.Y.S.2d 59 (N.Y. 1985) (amendment of state law to allow bona fide age qualification was applicable to case).

35. Lamarre v. Granville Cent. School, 484 N.Y.S. 2d 236 (N.Y. App. Div. 1985) (inability to climb ladder and lift objects precluded finding of discrimination); State Div. of Human Rights v. Leroy Cent. School Dist., 485 N.Y.S.2d 907 (N.Y. App. Div. 1985) (requiremnt of daily hormone medication did not reasonably preclude operation of bus); Giampa v. Commmonweatlh, 492 A.2d 504 (Pa. Commw. Ct. 1985) (state hearing standard for bus drivers not discriminatory and not violative of due process).

36. 29 U.S.C. § 794.

37. Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985).

38. Arline v. School Bd., 772 F.2d 759 (11th Cir. 1985).

Speech

Of three cases concerning a teacher's right to freedom of speech in curriculum matters, a teacher was successful in only one. A federal appeals court held that a teacher's right to academic freedom was violated when he was fired after public controversy arose surrounding his teaching of a unit on sexual reproduction.[39] Although the citizen who initiated the controversy was protected from liability by the first amendment freedom of petition provision, school officials were held liable for over $300,000 in damages because the book used by the teacher had been approved by the board, the course films had been used for years, and the principal had approved the teaching methods. In another case, however, where a teacher used a supplemental book in the homosexual rights unit of a course without obtaining the superintendent's approval as required by district policy, the teacher's dismissal was upheld.[40] Even thought the policy was not generally enforced, it was effective in this case because of a memo to the teacher from the principal specifically stating that it would be enforced with respect to the homosexual rights unit. The court clarified that the authority to choose instructional materials lies with the board. In the third case, a teacher was denied declaratory and injunctive relief when he claimed that his school's cancellation of a proposed tolerance day that included a lesbian speaker violated his right to freedom of speech.[41] Although the court said that the teacher had no first amendment right to control curriculum options, it also noted that legitimate concerns about disruption stemming from numerous phone calls, several bomb threats, etc., justified cancelling the proposed program.

Teachers also were unsuccessful in the majority of cases where they put forth free speech claims unrelated to curriculum concerns. A district that prohibited voluntary religious meetings of school employees, on school grounds but before classes began, did not violate the employees' free speech rights because the district had not created a limited public forum for employee speech activities.[42] In another case, a principal's dismissal for sexual remarks that interfered with his leadership capabilities did not deny his freedom of speech.[43] In an additional five cases, teachers were unable to demonstrate that their

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39. Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985).
40. Fisher v. Fairbanks N. Star Borough School Dist., 704 P.2d 213 (Alaska 1985).
41. Solmitz v. Maine School Admin. Dist. No. 59, 495 A.2d 812 (Me. 1985).
42. May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761 (S.D. Ind. 1985).
43. Rabon v. Bryan County Bd. of Educ., 326 F.2d 577 (Ga. Ct. App. 1985).

speech was a matter of public concern rather than private grievance;[44] and in two cases where courts found legitimate free speech activity, adverse employment decisions nevertheless were upheld.[45]

Illustrative of the latter type of case is a situation where a teacher spoke out regarding teacher assignments, student course registration procedures, and hiring for joint coaching-academic positions.[46] Citing *Pickering v. Board of Education* and *Connick v. Myers*,[47] the court noted that speech must concern matters of public importance in order to be protected activity; the speech must be a substantial or motivating factor in any adverse action, according to *Mt. Healthy City School District Board of Education v. Doyle*;[48] and adverse actions may still be legitimate if they would have occurred in the absence of the protected speech-related activity, according to *Givhan v. Western Lines Consolidated School District*.[49] Since the teacher's speech was only "tangentially related to matters of public concern," the court had no need to proceed with the three-part test.

Among the few cases where employees' free speech claims were successful was a situation where dismissal proceedings against a tenured teacher were enjoined because the teacher had spoken out about politically motivated transfers, a major topic of concern among several hundred citizens.[50] Another teacher was protected from retaliation where he chose to air nonpublic concerns about teacher assignment and evaluation directly to the school board despite a policy that teachers should communicate with the board through the superinten-

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44. Day v. South Park Indep. School Dist., 768 F.2d 696 (5th Cir. 1985) (disagreement with principal's negative evaluation of teacher not protected speech); Roberts v. Van Buren Pub. Schools, 773 F.2d 949 (8th Cir. 1985) (controversy concerning handling of parental complaints not a matter of public concern); Ferrara v. Mills, 596 F. Supp. 1069 (S.D. Fla. 1984) (administrative disagreements not of sufficient public concern); Stevenson v. Lower Marion County School Dist. No. 3, 327 S.E.2d 656 (S.C. 1985) accusation that superintendent incited student disturbances was personal matter); Heywood v. Thompson School Dist. R2-J, 703 P2d 1308 (Colo. Ct. App. 1985) (confrontations with principal were related to professional responsibilities unique to teacher).

45. Patterson v. Masem, 774 F.2d 251 (8th Cir. 1985) (protest against school play a matter of public concern but also educationally disruptive); Board of Trustees v. Gates, 461 So. 2d 730 (Miss. 1984) (teacher insubordination supported dismissal despite legitimate free speech activity).

46. Ferrara v. Mills, 596 F. Supp. 1069 (S.D. Fla. 1984).

47. 391 U.S. 563 (1968); 461 U.S. 138 (1983).

48. 429 U.S. 274 (1977).

49. 439 U.S. 410 (1979).

50. Wichert v. Walter, 606 F. Supp. 1516 (D.N.J. 1985). *See also* Fishman v. Clancy, 763 F.2d 485 (1st Cir. 1985) (allegations of retaliation against teacher who protested cut-backs in reading program were supported by evidence); Morrison v. Salida School Dist., 701 P2d 101 (Colo. Ct. App. 1984) (backpay and reinstatement affirmed where conclusive case of nonrenewal for excessive outspokenness fully litigated and not appealed).

dent.[51] Retaliation against employees whose speech is protected can be costly as evidenced by punitive damages of $65,000 that were assessed against a superintendent and a principal;[52] although, in another case, compensatory damages of $514,333 were held excessive where retaliatory measures short of dismissal were proven.[53] And in a final case, summary judgment against a teacher was reversed where a free speech claim raised disputed facts that were not appropriate for summary resolution.[54]

Association

Employees in three cases failed to prove that bias against their union activities was a motivating factor in subsequent discharges;[55] another case was remanded for a jury determination on the issue of motivation.[56] In a successful suit, teachers obtained declaratory and injunctive relief that revoked retaliatory transfers and protected their associational and speech rights in connection with rival union activities.[57]

Religion

In a case where employees alleged a violation of their right to freedom of religion (as well as speech and association), a school district successfully defended its policy of disallowing employee prayer meetings on school grounds.[58] Applying the tripartite establishment clause test from *Lemon v. Kurtzman*,[59] the court determined that the policy had a secular purpose, that it neither advanced nor inhibited religion, and that it would avoid excessive state-church entanglement by making unnecessary the "comprehensive and continuing supervision" of meetings to assure nonparticipation by students. The court

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51. Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985).
52. Fishman v. Clancy, 763 F.2d 485 (1st Cir. 1985).
53. Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985).
54. Holley v. Seminole County School Dist., 755 F.2d 1492 (11th Cir. 1985).
55. Heywood v. Thompson School Dist. R2-J, 703 P.2d 1308 (Colo. Ct. App. 1985); Byrnes v. Mecosta-Osceola Intermediate School Dist., 367 N.W.2d 831 (Mich. Ct. App. 1983); Buchheit v. Hamilton City Bd. of Educ., 473 N.E.2d 61 (Ohio Ct. App. 1984).
56. Roberts v. Van Buren Pub. Schools, 773 F.2d 949 (8th Cir. 1985).
57. Missouri Nat'l Educ. Ass'n v. New Madrid County R-1 Enlarged School Dist., 606 F. Supp. 25 (E.D. Mo. 1984).
58. May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761 (S.D. Ind. 1985).
59. 403 U.S. 602, 612-13 (1971).

was particularly concerned that allowing the meetings in the "sensitive atmosphere of an elementary school" might give the appearance of state support for religion. Although making no explicit determination that the policy burdened free exercise rights, the court said that establishment clause principles created a compelling state interest in maintaining the policy.

Privacy

A federal court of appeals reversed and remanded a directed verdict against a teacher because of substantial evidence suggesting that the teacher's divorce was the reason for her nonrenewal.[60] Reviewing a number of Supreme Court cases, including *Carey v. Population Services International*,[61] the court determined that decisions related to marital status are protected by the constitutional right to privacy. Evidence in favor of the teacher included testimony by a principal and a school board member that the superintendent had told them his decision not to rehire the plaintiff was based on her pending divorce.

Substantive Due Process

Violations of substantive due process often are said to arise when state actions are arbitrary, capricious, or unfair in substance rather then lacking in procedural regularity; or when actions or policies violate a nonexplicit liberty right. Substantive due process was not denied in a case where the state's auditory proficiency standard for bus drivers was not "too sweeping,"[62] nor in another case where a custodian's resignation was not coerced.[63] In the latter case, because school officials believed that an alleged theft of money from a copying machine could be proved, a choice between resignation and probable dismissal was not made under duress in violation of due process. In a third case, although the court did not explicitly discuss due process, it found that the dismissal of a white cafeteria manager (who worked in a predominately black school) for enrolling her son in a private, white school, violated her "constitutionally protected interest in the education of her son."

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60. Littlejohn v. Rose, 768 F.2d 765 (6th Cir. 1985).
61. 431 U.S. 678 (1971).
62. Giampa v. Commonwealth, 492 A.2d 504 (Pa. Commw. Ct. 1985).
63. People *ex rel.* Schoepf v. Board of Educ., 606 F. Supp. 385 (N.D. Ill. 1985).

PROCEDURAL DUE PROCESS

The due process clause of the fourteenth amendment prohibits the state from denying to "any person . . . life, liberty, or property, without due process of law." In order to be entitled to procedural due process, which usually includes notice and some type of hearing, an employee must first establish that a "liberty" or "property" interest is being infringed by government actions or policy; threatened deprivations of "life" are not relevant in the employment context.

In 1985's leading case on due process, *Cleveland Board of Education v. Loudermill*,[64] the Supreme Court made clear that "the 'root requirement' of the [d]ue [p]rocess [c]lause" entails giving an individual "an opportunity for a hearing *before* he is deprived of any significant property interest."[65] Although in emergency situations, employees may be suspended with pay pending a hearing, the general rule is that prior "notice and an opportunity to respond" are "essential requirements of due process."[66] Because state law mandated a full post-termination evidentiary hearing, the Court sanctioned an attenuated pretermination hearing in the *Loudermill* case and noted that "the tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[67] The Court implied that absent provisions for an extensive post-termination hearing, more formal requirements would be necessary prior to dismissal.

In a case decided three days after *Loudermill*, a federal district court in New York held that where a teacher was given a statutory right to obtain a "similar position" upon abolition of a former position, a property right was created, requiring at least a preliminary hearing before discharge to assess disputed issues of fact.[68] Unless at the time of discharge it could be said as a matter of law that the positions were dissimilar, a summary pretermination hearing would be required, followed by a more elaborate hearing at a later time. The school board's motion to dismiss was denied in this case because a major factual dispute existed: whether the position of high school dean had been abolished and a new position of high school administrative

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64. 105 S. Ct. 1487 (1985).

65. *Id.* at 1493, *quoting* Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (emphasis in the original).

66. *Id.* at 1495. *See also* Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985) (postdeprivation hearing legitimate only where predeprivation hearing "impracticable" or "impossible").

67. *Id.*

68. DeSimone v. Board of Educ., 604 F. Supp. 1180 (E.D.N.Y. 1985).

assistant created, or whether the first position merely had been renamed rather than abolished.

Liberty and Property Interests

Among the cases where liberty and property interests were judicially noted,[69] was a case rejecting a teacher's asserted "liberty right" to regain a guidance position (and thus pursue his chosen occupation) by seeking decertification in science.[70] No liberty right was implicated because the teacher was free to seek a guidance job elsewhere. The court noted that to the extent the teacher asserted a right to the particular guidance position (a property right), such right was negated by the district's authority to transfer teachers within their areas of certification. Also among unsuccessful plaintiffs was a probationary employee who had no "claim of entitlement" to reemployment; and a superintendent who, while relieved of his duties, was not denied a property right because he continued to receive full salary and benefits.[71]

Illustrating the maxim derived from *Board of Regents v. Roth*,[72] that damage to reputation (a liberty interest) must be coupled with a loss of employment opportunity in order to trigger due process, is a case where a teacher was dismissed for unconstitutional reasons without being allowed a "fair opportunity" for defense. The court held that the board's actions violated the teacher's property interests and imposed a "stigma" that "foreclosed a definite range of employment opportunities."[73]

Illustrating another *Roth* maxim—that property rights are not based on the Constitution but rather derive from state or local law or policy—are four cases that also demonstrate the wide variety of avail-

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69. *See*, Rogers v. Masem, 774 F.2d 328 (8th Cir. 1985) (probationary teacher's [property] right to a hearing created by state law); Payne v. Ballard, 761 F.2d 491 (8th Cir. 1985) (past practice does not create property interest in absence of contract); Franceski v. Plaquemines Parish School Bd., 772 F.2d 197 (5th Cir. 1985) (tenured status a protected property right); Zimmerman v. Board of Educ., 597 F. Supp. 72 (D. Conn. 1984) (local provision or mutual understanding inconsistent with state law does not give rise to property interest); Ferdinand v. Hamilton Local Bd. of Educ., 478 N.E.2d 835 (Ohio Ct. App. 1984) (school lunch supervisor's continuing contract created a vested right); California School Employees Ass'n v. Compton Unified School Dist., 211 Cal. Rptr. 653 (Cal. Ct. App. 1985) (state law gave employees "permanent status" property right despite local rule to the contrary); Gardner v. School Dist. No. 55, 700 P2d 56 (Idaho 1985) (superintendent without contract had no property right).

70. Audet v. Board of Regents, 606 F. Supp. 423 (D.R.I. 1985).

71. Eureka County School Dist. Bd. of Trustees v. Holbo, 705 P2d 640 (Nev. 1985); Royster v. Board of Trustees, 774 F.2d 618 (4th Cir. 1985).

72. 408 U.S. 565 (1972).

73. Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985).

able property rights. That property rights can consist of something less than a right to employment *per se* is shown by cases finding state- or locally-created property rights (1) to particular positions, (2) to "similar" positions upon abolition of current job-slots, (3) to placement and retention on a mandatory eligibility list for teacher employment, and (4) to local predemotion rights in addition to those mandated by statute.[74]

Aspects of Notice

In order to comport with the Constitution's procedural due process requirement, it is necessary that those against whom adverse employment decisions are contemplated must receive actual notice of the charges against them.[75] In addition, the notice must be sufficiently detailed to enable the preparation of a defense.[76] Adequacy of notice was demonstrated in a case where a school bus driver was fully informed of charges against her, despite the fact that she was notified only immediately before her termination hearing that she might be represented by an attorney.[77] A teacher also was given adequate notice of cause for dismissal when teaching deficiencies that were outlined in two prior evaluations were attached to the notice of proposed dismissal.[78] In a case where the court held the initial notice impermissibly vague, it nevertheless concluded that an explanation of charges at an informal pretermination hearing—coupled with the failure to request more detail, time, and a formal hearing—was sufficient to afford due process.[79]

Although a terminated tenured principal was given adequate notice of improperly attempting to purchase a home computer with school funds, he did not receive adequate notice of other charges that were relied on in the dismissal proceedings.[80] Analogously, where dismissal charges surrounding alleged sexual misconduct were not

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74. Sweeney v. Special School Dist. No. 1, 368 N.W.2d 288 (Minn. Ct. App. 1985); DeSimone v. Board of Educ., 612 F. Supp. 1568 (E.D.N.Y. 1985); Stana v. School Dist., 775 F.2d 122 (3d Cir. 1985); Jones v. Palm Springs Unified School Dist., 216 Cal. Rptr. 75 (Cal. Ct. App. 1985).

75. *See, e.g.*, Okeson v. Tolley School Dist. No. 25, 760 F.2d 864 (8th Cir. 1985) (neither actual notice nor waiver of notice was proved).

76. *See, e.g.*, Saxby v. Bibb County Bd. of Educ., 327 S.E.2d 494 (Ga. Ct. App. 1985) (written notice must detail charges in order that error might be detected).

77. Rodgers v. Norfolk School Bd., 755 F.2d 59 (4th Cir. 1985).

78. Hanlon v. Board of Educ., 695 S.W.2d 930 (Mo. Ct. App. 1985).

79. Strange v. School Bd., 471 So. 2d 90 (Fla. Dist. Ct. App. 1985).

80. Benton v. Board of Educ., 361 N.W.2d 515 (Neb. 1985).

proved, subsequent dismissal on charges not specified in the notice could not be upheld.[81]

Aspects of Hearing

Where a teacher initially waived a board hearing in favor of arbitration, one 1985 case held that due process was not denied by a board that failed to grant the teacher's subsequent request for a hearing;[82] another teacher's request for a hearing was denied when a trial-type hearing before an impartial panel was held and a full factual account was given to the board.[83]

In addition to the above cases, there were several instances where the procedural propriety of various aspects of the hearing process itself were challenged. While the judiciary approved trial-like procedural protections in many cases, it generally resisted employees' attempts to require procedures completely analogous to those mandated in judicial proceedings. It was rare for the judiciary to hold hearing procedures inadequate as a matter of federal constitutional law.

Hearing procedures were found to be adequate for due process purposes where an employee was not allowed to cross-examine but was informed of the identities and accusations of emotionally disturbed children who had witnessed the employee's alleged knife fight.[84] In other cases, due process was held not to require discovery of documents and the substance of witnesses' testimony, written procedural rules, the presence of witnesses not shown by the defense to be material, and the exclusion of a witness' testimony about statements made prior to two sessions of hypnosis.[85] It also was not improper to employ the regular school district attorney as a hearing examiner nor to ignore potentially exculpatory polygraph results.[86]

In a case invalidating hearing procedures as a matter of federal constitutional law, it was held that due process requires written findings of fact and relevant evidence so that parties are assured that a decision has been made on the record as a whole rather than on the

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81. Saxby v. Bibb County Bd. of Educ., 327 S.E.2d 494 (Ga. Ct. App. 1985).

82. Scotchlas v. Board of School Directors, 496 A.2d 916 (Pa. Commw. Ct. 1985).

83. Pagano v. Board of Educ., 492 A.2d 197 (Conn. App. Ct. 1985).

84. Rodgers v. Norfolk School Bd., 755 F.2d 59 (4th Cir. 1985).

85. Hanlon v. Board of Educ., 695 S.W.2d 930 (Mo. Ct. App. 1985); Cope v. Board of Educ., 495 A.2d 718 (Conn. App. Ct. 1985); Jeter v. Alabama State Tenure Comm'n, 473 So. 2d 513 (Ala. Civ. App. 1985); Mondragon v. Poudre School Dist. R-1, 696 P.2d 831 (Colo. Ct. App. 1984).

86. Holley v. Seminole County School Dist., 755 F.2d 1492 (11th Cir. 1985); Donnelly v. Carmel Cent. School Dist., 486 N.Y.S.2d 309 (N.Y. App. Div. 1985).

basis of "extralegal considerations."[87] Other cases finding procedural problems generally referred exclusively to violations of state statutory procedures.[88] That not every violation of contract or state statute amounts to a due process violation, is illustrated by a case holding that notice and an opportunity to be heard satisfied federal constitutional requirements even though procedures may have violated state law.[89]

DISMISSAL, NONRENEWAL, AND DISCIPLINE

Questions of dismissal, nonrenewal, and discipline are governed by a variety of state statutes, local school board policies, and local contract provisions. Absent a colorable claim that an employee's constitutional rights have been violated, dismissal of tenured teachers, as well as those under term contracts, is governed largely by state statutes. These statutes often provide for dismissal based on charges of insubordination, unprofessional conduct, unfitness, wilful neglect of duty, immorality, incompetence, and "other good cause"; statutes also generally prescribe appropriate procedures for dismissal. Judicial review is limited to an assessment of procedural sufficiency and the substantiality of the evidence upon which administrative determinations have been based. Initial determinations are not reversed unless they are determined to be arbitrary or capricious.

Because nonrenewal decisions usually do not involve constitutional considerations, any substantive and procedural protections for nonrenewed employees must be derived from state or local law, policy, or practice. From the cases reviewed in this section, it appears that there is a trend to provide procedural protections in nonrenewal cases even though not required by the Constitution.

Insubordination

An equal number of insubordination cases were proved against teachers as disproved, and an additional case against a secretary was remanded.[90] Insubordination was shown when teachers continued to use physical discipline against students, refused to accept a transfer

87. Smith v. Board of Educ., 484 N.Y.S.2d 602 (N.Y. App. Div. 1985).
88. *See, e.g.*, Spurlock v. Board of Trustees, 699 P.2d 270 (Wyo. 1985).
89. Franceski v. Plaquemines Parish School Bd., 772 F.2d 197 (5th Cir. 1985).
90. Oregon School Employees Ass'n, Chapter 115 v. Pendleton School Dist., 699 P2d 1155 (Or. Ct. App. 1985) (remanded for consideration of all of head secretary's insubordinate acts to see if they amounted to "flagrant insubordination").

and perform staff duties, and failed to timely submit lesson plans and maintain adequate and complete student folders.[91] Illustrative of cases where insubordination was not proven was a Pennsylvania case where teachers' isolated actions of corporal punishment of students, while in violation of board policy, were not intemperate, cruel, or willfully and persistently in violation of school laws.[92]

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

There were very few cases where employees were successful in repudiating charges of unprofessional conduct, unfitness, or willful neglect of duty. In one case it was held that a teacher did not abandon her position; in another, unauthorized corporal punishment was held to be a remediable teaching deficiency; and, in a third, a teacher's guilty plea to possession of marijuana could not be used against her in a disciplinary hearing because of a state statute protecting first time offenders.[93]

Illustrative of ten cases where employees lost are situations where there existed sexual harassment of staff and students by a school counselor, physical abuse of emotionally disturbed students, the use of vulgar and profane language, failure to report rape and child abuse, and unnecessary use of force against students.[94] Less serious but sufficient charges included abusing a sick leave policy, refusing to prepare and submit teaching goals and objectives, persistent tardiness, improper record keeping, and unsatisfactory classroom presentation and control of students.[95]

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91. Simmons v. Vancouver School Dist. No. 37, 704 P.2d 648 (Wash. Ct. App. 1985); Adlerstein v. Board of Educ., 485 N.Y.S.2d 1 (1984); Clarke v. Board of Educ., 482 N.Y.S.2d 80 (N.Y. App. Div. 1984).

92. Belasco v. Board of Pub. Educ., 486 A.2d 538 (Pa. Commw. Ct. 1985). Other insubordination cases were Bourland v. Commission on Professional Competence, 219 Cal. Rptr. 906 (Cal. Ct. App. 1985) (teacher's refusal to write performance objectives was not equivalent to persistent refusal to obey laws or regulation); and Schiffer v. Board of Educ., 491 N.Y.S.2d 826 (N.Y. App. Div. 1985) (refusal to attend psychiatric sessions without union representative did not equal insubordination where teacher had right to take representative).

93. Ciccarelli v. Board of Educ., 486 N.Y.S.2d 578 (N.Y. App. Div. 1985); Mott v. Endicott School Dist. No. 308, 695 P.2d 1010 (Wash. Ct. App. 1985); Tate v. Board of Educ., 485 A.2d 688 (Md. Ct. Spec. App. 1985).

94. Downie v. Independent School Dist. No. 141, 367 N.W.2d 913 (Minn. Ct. App. 1985); Pisculli v. Board of Educ., 492 N.Y.S.2d 807 (N.Y. App. Div. 1985); Holley v. Seminole County School Dist., 755 F.2d 1492 (11th Cir. 1985); Bellevue Pub. School Dist. No. 405 v. Benson, 707 P.2d 137 (Wash. Ct. App. 1985); *In re* Doyle, 493 A.2d 54 (N.J. Super. Ct. App. Div. 1985).

95. Ward v. Board of Educ., 496 A.2d 1352 (Pa. Commw. Ct. 1985); Wiley v.

Immorality

Twice as many allegations of immorality against teachers were proved as were not proved, with charges ranging from making false statements[96] to having sexual relations with a student.[97] Other teachers were dismissed for publicly engaging in sexual intercourse, for using sexually suggestive language with students and seeking dates with them, for sexual advances toward a student, and for theft.[98]

In many of these types of cases it is necessary to show not only that the acts were committed (e.g., that the "theft" was proven),[99] but that the behavior was encompassed within the meaning of a statutorily sufficient cause for dismissal (e.g., that a "theft" was a "crime of moral turpitude"). Examples of behavior that was insufficient to prove immorality occurred in two cases in 1985. Neither a male teacher who was seen in the company of a fourteen-year-old female student, nor a male counselor whose conduct in counseling a fifth grade girl included hugging and touching her, were shown to have engaged in immoral conduct.[100]

Incompetence

Nearly all of the twelve incompetence cases had to do with failure to control students[101] or unsatisfactory classroom performance.[102] Of three miscellaneous cases, one concerned a principal who was termi-

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Richland Parish School Bd., 476 So. 2d 439 (La. Ct. App. 1985); Wilson v. Commonwealth, 488 A.2d 664 (Pa. Commw. Ct. 1985); Strange v. School Bd., 471 So. 2d 90 (Fla. Dist. Ct. App. 1985); Governing Bd. v. Commission of Professional Competence, 217 Cal. Rptr. 457 (Cal. Ct. App. 1985).

96. Blog v. McKeesport Area School Dist., 484 A.2d 198 (Pa. Commw. Ct. 1984).

97. Mondragon v. Poudre School Dist. R-1, 696 P.2d 831 (Colo. Ct. App. 1984).

98. Ross v. Springfield School Dist. No. 19, 691 P.2d 509 (Or. Ct. App. 1984); Gardner v. Commission on Professional Competence, 210 Cal. Rptr. 795 (Cal. Ct. App. 1985); Jeter v. Alabama State Tenure Comm'n, 473 So. 2d 513 (Ala. Civ. App. 1985); Kenai Peninsula Borough Bd. of Educ. v. Brown, 691 P.2d 1034 (Alaska 1984).

99. *See, e.g.*, Bey v. Board of Educ., 488 A.2d 89 (Pa. Commw. Ct. 1985) (theft not proven by substantial evidence).

100. Saxby v. Bibb County Bd. of Educ., 327 S.E.2d 494 (Ga. Ct. App. 1985); Board of Educ., v. Sickley, 479 N.E.2d 1142 (Ill. App. Ct. 1985).

101. Board of Educ. v. Wolff, 361 N.W.2d 750 (Mich. Ct. App. 1984); Hamburg v. North Penn School Dist., 484 A.2d 867 (Pa. Commw. Ct. 1984); Crump v. Durham County Bd. of Educ., 327 S.E.2d 599 (N.C. Ct. App. 1985).

102. Cope v. Board of Educ., 495 A.2d 718 (Conn. App. Ct. 1985); *In re* Gaetjens, 485 A.2d 1057 (N.H. 1984); Eshom v. Board of Educ., 364 N.W.2d 7 (Neb. 1985); Hanlon v. Board of Educ., 695 S.W.2d 930 (Mo. Ct. App. 1985); Dunnigan v. Ambach, 484 N.Y.S.2d 373 (N.Y. App. Div. 1985).

nated for sexual harassment of a job applicant and a former teacher; another dealt with a tenured teacher who was dismissed because of alcoholism; and the last concerned an ineffective nonrenewal where a school board policy (created pursuant to state statute) listed "incompetence" as a legitimate reason for nonrenewal, but did not cover "community feeling of incompetence."[103] There were no cases reported where employees successfully defended against charges of incompetence.

Compliance with School Board Policies and State Statutes

In the process of making and implementing an adverse employment decision, the necessity for and the adequacy of compliance with various state and local mandates must be considered. Cases reviewed in this subsection concern the disciplinary authority's effectuation of dismissal, nonrenewal, and other adverse employment decisions (e.g., reprimand, unsatisfactory rating, demotion, transfer, failure to promote, and suspension). Where an adverse action is not disciplinary in nature (e.g., when based on illness), procedural protections that might otherwise be available often are not required;[104] the same is usually true of a simple nonrenewal.

There were sixteen cases in 1985 dealing with the application of various local or state policies to dismissal situations. Pretermination rights of a school superintendent and an at-will custodian were judicially preserved where these entitlements were created by local board policy;[105] and another case was remanded to determine if a board's delegation of authority to dismiss bus drivers was properly delimited.[106] Statutory notice requirements were complied with where a teacher was given notice and informed of her right to ask for an open session.[107] In another case, a legally sufficient January dismissal could not be made retroactive to April 1st, but did provide sufficient prior

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103. Phillips v. Plaquemines Parish School Bd., 465 So. 2d 53 (La. Ct. App. 1985); Christy v. Board of Educ., 694 S.W.2d 280 (Mo. Ct. App. 1985); Seifert v. Lingleville Indep. School Dist., 692 S.W.2d 461 (Tex. 1985).

104. *See, e.g.*, Trotter v. Los Angeles County Bd. of Educ., 213 Cal. Rptr. 841 (Cal. Ct. App. 1985) (medical layoff not disciplinary, so no hearing required per statute).

105. Jones v. Palm Springs Unified School Dist., 216 Cal. Rptr. 75 (Cal. Ct. App. 1985); Pavadore v. School Comm., 473 N.E.2d 205 (Mass. App. Ct. 1985).

106. Jacobs v. Fremont Re-1 School Dist., 697 P.2d 414 (Colo. Ct. App. 1384).

107. State v. VanLare, 370 N.W.2d 271 (Wis. Ct. App. 1985).

notice for the ensuing year.[108] Ten additional cases dealt with a variety of state statutory mandates.[109]

Illustrating the consequences that flow from inadequate attention to state mandates is a case where a letter of termination was ineffective where it was not given at the time of the attempted dismissal or prior thereto.[110] Another dismissal was invalidated where it resulted from a teacher's refusal to accept a transfer to a position for which he was not certified;[111] such a transfer would have been illegal under state law.

Seven cases dealt with the application of state or local mandates to nonrenewal situations, with three holding, respectively, that a nonrenewal was statutorily ineffective because it was based on the submission of a grievance, that the board substantially complied with state-mandated procedural requirements, and that the state had no authority to review nonrenewal decisions.[112] In the other cases, notice of nonrenewal was held to comply with state law or local policy.[113]

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108. Boyle v. Board of Trustees, 707 P.2d 1135 (Nev. 1985).

109. Babitzke v. Silverton Union High School No. 7J, 695 P.2d 93 (Or. Ct. App. 1985) (state board had authority to invalidate dismissal where resignation from coaching duties was not a "total resignation" amounting to a consent to dismiss); School Comm. v. Teachers' Retirement Bd., 471 N.E.2d 61 (Mass. 1984) (statute precluded retirement board from reviewing teacher dismissals that were not arbitrary or irrational); Mullins v. Kiser, 331 S.E.2d 494 (W. Va. 1985) (teacher not subject to statute providing for dismissal of "public officials"); Connell v. Board of Educ., 483 N.Y.S.2d 504 (N.Y. App. Div. 1984) (neither lack of formal appointment nor federal funding of position precluded application of statutory dismissal rights); Schachter v. Tomaselli, 481 N.Y.S.2d 725 (N.Y. App. Div. 1984) (judicial review of alleged procedural errors must await final administrative determination); Schuck v. Board of Educ., 490 N.Y.S.2d 565 (N.Y. App. Div. 1985) (state statute did not give central school district employee pretermination rights, though city school district employees had such rights); Wagenblast v. Crook County School Dist., 707 P.2d 69 (Or. Ct. App. 1985) (state fair dismissal law not applicable to noncertified teacher's dismissal); Spurlock v. Board of Trustees, 699 P.2d 270 (Wyo. 1985) (discharge from principalship substantively and procedurally sufficient, though insufficient to affect status as teacher); Allegheny Intermediate Unit v. Jarvis, 490 A.2d 959 (Pa. Commw. Ct. 1985) (dismissal for refusal to accept a transfer for which teacher not certified was an illegal dismissal); Glover v. School Bd., 462 So. 2d 116 (Fla. Dist. Ct. App. 1985) (no attorney fees provided under state statute unless dismissal action "devoid of merit").

110. Sidney N. Collier Memorial Vocational-Technical School v. Caulfield, 460 So. 2d 54 (La. Ct. App. 1984).

111. Allegheny Intermediate Unit v. Jarvis, 490 A.2d 959 (Pa. Commw. Ct. 1985)

112. Marshall County Cent. Educ. Ass'n v. Independent School Dist. No. 441, 363 N.W.2d 126 (Minn. Ct. App. 1985); Neyland v. Board of Educ., 487 A.2d 181 (Conn. 1985); York v. Board of School Comm'rs, 460 So. 2d 857 (Ala. 1984).

113. Prichard v. Board of Educ., 705 P.2d 473 (Ariz. Ct. App. 1985) (no second notice of nonrenewal required where superintendent's notice to teacher adopted by board three days before deadline); Martinez v. Anchorage School Dist., 699 P.2d 330 (Alaska 1985) (notice timely when picked up on day registered letter would have ar-

Of thirteen cases concerning other adverse employment actions, two dealt with reprimands,[114] one with an unsatisfactory rating,[115] three with demotions,[116] two with transfers,[117] one with a failure to consider for promotion,[118] and three with suspensions.[119]

REDUCTION-IN-FORCE AND INVOLUNTARY LEAVES OF ABSENCE

Reorganization or consolidation of school districts or property within districts, declining student enrollments, or fiscal restraints may necessitate the elimination of professional positions. The legality of invoking reduction-in-force (RIF) procedures, the selection of employees to be terminated or laid-off, the realignment of remaining personnel, and call-back rights are governed by state and local law; employees in these situations generally do not have the "legitimate claim of entitlement" to their positions that would allow constitutional

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rived); Green Forest Pub. Schools v. Herrington, 696 S.W.2d 714 (Ark. 1985) (nonrenewal hearing did not substitute for prior written notice requirement); Hein v. Board of Educ., 698 P2d 388 (Kan. Ct. App. 1985) (insufficient notice was harmless error where teacher was able to exercise right to hearing); Seifert v. Lingleville Indep. School Dist., 692 S.W.2d 461 (Tex. 1985).

114. Tomaka v. Evans-Brant Cent. School Dist., 486 N.Y.S.2d 546 (N.Y. App. Div. 1985) (written admonition for insubordinate action required no formal hearing); Brown v. Red River Parish School Bd., 469 So. 2d 1110 (La. Ct. App. 1985) (reprimand and probation entitled plaintiff to review under teacher removal statute).

115. Williams v. Board of Educ., 481 N.Y.S.2d 737 (N.Y. App. Div. 1984) (procedural adequacy precluded new hearing on unsatisfactory rating).

116. Daugherty v. Hunt, 694 S.W.2d 719 (Ky. Ct. App. 1985) (illegal demotion effected by inadequate notice of salary reduction); Vielle v. Reorganized School Dist. No. R-1, 689 S.W.2d 72 (Mo. Ct. App. 1985) (unlawful demotion effected by freezing salary); Swanson v. Board of Educ., 481 N.E.2d 1248 (Ill. App. Ct. 1985) (reclassification from principal to teacher required only that employee be heard in a public forum, not full evidentiary hearing).

117. Alabama State Tenure Comm'n v. Phenix City Bd. of Educ., 467 So. 2d 263 (Ala. Civ. App. 1985) (principal's transfer upheld where it served reasonable administrative function and was not for personal/political reasons); Holland v. Board of Educ., 327 S.E.2d 155 (W. Va. 1985) (transfer for prior misconduct not permitted unless state board evaluation policy followed).

118. Bush v. State Bd. of Educ., 327 S.E.2d 826 (Ga. Ct. App. 1985) (black, female employee of state education department granted relief when white male employee promoted on noncompetitive basis in violation of board policy).

119. Tucker v. Board of Educ., 492 A.2d 839 (Conn. App. Ct. 1985) (state law gave no right to appeal three-year suspension for insubordination); Finley v. Independent School Dist., 359 N.W.2d 749 (Minn. Ct. App. 1985) (unrequested leave invalid for procedural irregularities); Martin v. School Comm. of Natick, 472 N.E.2d 231 (Mass. 1984) (proper notice given for five-day suspension); Rike v. Commonwealth, 494 A.2d 1388 (Pa. 1985) (judicial appeal of disciplinary suspension proper; suspension could be effected by majority vote of board); Smith v. Board of Educ., 493 N.Y.S.2d 114 (1985) (subsequent certification did not render prior suspensions unlawful).

due process to be invoked. Cases resulting from RIF which raised constitutional issues (such as due process or discrimination) are dealt with in the first three sections of this chapter.

Necessity for Reduction-in-force

Program reorganization and resulting layoffs must be necessary and not pretextual and must comply with statutorily approved reasons. Three cases illustrate these principles: a one-to-nineteen teacher-student layoff ratio was held reasonable and necessary;[120] a district was made to demonstrate the necessity of a layoff where the employee alleged that his discharge was influenced by dissatisfaction with his performance;[121] and reinstatement was ordered where layoffs were not approved by the state superintendent.[122]

Elimination of Position

Procedural protections vary from state to state, with most states requiring no hearing (as a matter of federal or state law) when positions are eliminated for good faith economic or educational reasons;[123] a few states require notice and a hearing.[124] Blanket notice to all administrators regarding their possible reassignment to teaching has been held statutorily sufficient, and actual notice was effective where an employee received board minutes and was present when his position was abolished.[125]

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120. Bochner v. Providence School Comm., 490 A.2d 37 (R.I. 1985).

121. Short v. Nevada Joint Union High School Dist., 210 Cal. Rptr. 297 (Cal. Ct. App. 1985).

122. Rosen v. Montgomery County Intermediate Unit No. 23, 495 A.2d 217 (Pa. Commw. Ct. 1985).

123. *See, e.g.*, Martin v. School Comm. of Natick, 480 N.E.2d 625 (Mass. 1985) (termination due to declining enrollments necessitates no hearing per statute, federal due process, or contract); Koppi v. Board of Control, 479 N.E.2d 36 (Ill. App. Ct. 1985) (RIF negates teacher's claim of property interest); Roberts v. Beecher Community School Dist., 372 N.W.2d 328 (Mich. Ct. App. 1985) (procedural protections not required for economic layoffs, which are inherently not arbitrary or capricious); Breslin v. School Comm. of Quincy, 478 N.E.2d 149 (Mass. App. Ct. 1985) (neither federal nor state due process required when positions eliminated for educational reasons); Petett v. Board of Educ., 684 S.W.2d 7 (Ky. App. Ct. 1985) (transfer for financial reasons did not violate due process); Wessely v. Carrolton School Dist., 362 N.W.2d 731 (Mich. App. Ct. 1984) (procedural safeguards inapplicable to fiscally necessitated layoffs).

124. *See, e.g.*, Ferdinand v. Hamilton Local Bd. of Educ., 478 N.E.2d 835 (Ohio Ct. App. 1984).

125. Tucker v. Roach, 210 Cal. Rptr. 295 (Cal. Ct. App. 1985); Smith v. Dorak-III School Dist., 682 S.W.2d 182 (Mo. Ct. App. 1984).

Selection of Employee

Apart from questions of reassignment, which are dealt with in the next subsection, most of the 1985 selection cases were of limited applicability.[126] One case, however, suggested a policy issue of some importance: whether layoffs will be governed by strict seniority or whether educational need will be considered. In a Pennsylvania case, it was held that a state statute required layoffs to be effected on a strict seniority basis, despite educational arguments that teachers with middle school experience were needed more than those with elementary experience.[127]

Realignment/Reassignment

Statutes, policies, and collective bargaining agreements governing the realignment/reassignment of professional personnel vary substantially from state to state and sometimes from district to district. Nevertheless, tenure status, seniority, and areas of certification usually are relevant factors. Tenured teachers are preferred over nontenured teachers; those with more years of credited service in a state, district, or position are favored over those with fewer years; and certification is usually necessary to "bump" someone in another discipline or at another rank (when such cross-area bumping is permitted at all). To the extent that considerations of a purely educational nature have not been factored into the overall realignment scheme, they are sometimes given explicit legal status. However, just as some states

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126. Duluth Fed'n of Teachers v. Independent School Dist., 361 N.W.2d 834 (Minn. 1985) (statute authorizing seniority credit for total years of employment was applicable to administrator and could not be negated by collective bargaining agreement); Bristol Township School Dist. v. Karafin, 498 A.2d 824 (Pa. 1985) (involuntary suspension due to declining enrollment may not be effected until after teachers receive earned sabbatical leaves); Baker v. Independent School Dist., 691 P2d 1223 (Idaho 1984) (no entitlement to remediation period before layoff for "other than unsatisfactory service"); Public Employees Fed'n v. Division of Classification and Compensation, 489 N.Y.S.2d 390 (N.Y. App. Div. 1985) (teachers voluntarily reclassified as developmental specialists did not retain right to reclassification as teachers for layoff purposes); Vettleson v. Special School Dist. No. 1, 361 N.W.2d 425 (Minn. Ct. App. 1985) (improper layoff resulted from actionable misrepresentation); Brandhorst v. Special School Dist. No. 1, 365 N.W.2d 383 (Minn. Ct. App. 1985) (layoffs for reasons other than licensure and seniority not permitted by statute); Berger v. Independent School Dist. No. 706, 362 N.W.2d 369 (Minn. Ct. App. 1985) (plaintiff's involuntary leave improper where second teacher placed in position had lost seniority rights because of extended leave).

127. Board of School Directors v. Ashby, 495 A.2d 665 (Pa. Commw. Ct. 1985). *See also* Brandhorst v. Special School Dist. No. 1, 365 N.W.2d 383 (Minn. Ct. App. 1985) (layoffs governed by licensure and seniority only).

make layoff decisions based on strict seniority, some also effect realignments without considering teacher competence.[128] State and local procedures for effecting realignments within a school or district will not necessarily apply when districts are consolidated or annexed.[129]

The propriety of particular realignment decisions depends on a variety of procedural and substantive factors that often have required additional information for resolution:[130] was the reassignment decision made in good faith;[131] did the school board obtain the teacher's consent to placement outside a major or minor field of study, as required by board policy; etc.?[132] Issues that have arisen when one teacher claims a right to bump another are whether the teacher has a right to bump, whether the teacher is in fact certified or qualified to bump, and whether the right to bump extends across department lines (i.e., whether it is a school-wide right).[133]

More complex questions arise when a teacher claims a right to have more than one teacher displaced (multiple bumping) in order to create a position vacancy the original teacher is qualified to fill. One case, for example, held that in the absence of statutory language calling for multiple reassignments, elementary teachers threatened with layoff had no right to demand that those elementary teachers qualified to teach at the high school level be allowed to bump less-senior high school teachers.[134] The permissibility of realignment between teaching and administrative areas varies, with vertical realignment sometimes proceeding only downward—from administrative ranks to teaching ranks.[135] On the other hand, several cases illustrate that lay-

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128. *In re* Cowden, 486 A.2d 1014 (Pa. Commw. Ct. 1984).

129. *See, e.g.*, Woodard v. Wabbaseka-Tucker Pub. School Dist., 689 S.W.2d 546 (Ark. 1985) (no statutory right to employment in new district to which home district annexed).

130. *See, e.g.*, State v. Board of Educ., 367 N.W.2d 461 (Minn. 1985); Fry v. Commonwealth, 485 A.2d 508 (Pa. Commw. Ct. 1984).

131. Pennell v. Board of Educ., 487 N.E.2d 445 (Ill. App. Ct. 1985) (bad faith reassignment cannot be used to defeat tenure rights).

132. Board of Educ. v. Dowling, 360 N.W.2d 315 (Mich. Ct. App. 1984) (mutual consent a valid qualification to reassignment outside major or minor field).

133. Rippe v. Board of Educ., 486 N.Y.S.2d 713 (N.Y. 1985) (right to bump extends only to teachers given probationary appointments after Aug. 1, 1975, and then only as to tenure areas created at that time); Blank v. Independent School Dist., 372 N.W.2d 386 (Minn. Ct. App. 1985) (administrators not covered by realignment agreement; teacher entitled to bump because "qualified" [licensed and experienced]); Hanlon v. Board of Educ., 474 N.E.2d 407 (Ill. App. Ct. 1985) (teacher failed to demonstrate qualification for position sought); Ruter v. Independent School Dist., 364 N.W.2d 823 (Minn. Ct. App. 1985) (school-wide bumping right upheld).

134. Gallison v. Bristol School Comm., 493 A.2d 164 (R.I. 1983).

135. Derry Township School Dist. v. Finnegan, 498 A.2d 474 (Pa. Commw. Ct. 1985) (multiple realignment across teaching and administrative ranks not required to

offs by seniority demand school-wide horizontal realignments across disciplines.[136]

Call-back Rights

Even though state statutes may provide for multiple realignment when layoffs are initially made, one case has held that this right does not extend to the call-back period.[137] In this case, state law provided preferential call-back rights for one calendar year from the beginning of the term following layoff, but only for positions that happened to become available.

An area of increasing litigation concerns the right of laid-off employees to be appointed to new positions that are, at times, similar to the positions the employees formerly held. Two Massachusetts cases held that a department head who was displaced by a good faith consolidation of departments had no right to be appointed head of the new department, and that junior high school principals had no right to be appointed principal of newly created middle schools.[138] In New York State, where state law gives a right to be appointed to newly created "similar position," the employee must be qualified for the new position;[139] and the position vacated must, in fact, be similar to the position sought.[140] A federal district court sitting in New York has held that these types of cases require a pretermination hearing to assess similarity.[141] Citing *Cleveland Board of Education v. Loudermill*,[142] the court said that plaintiff had been deprived of "the means of his livelihood" when the position of high school dean was replaced by a new administrative assistant position, and that such deprivation of property without a pretermination hearing was a violation of procedural due process.

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preserve the job of a tenured teacher seeking displacement of a temporary principal); Connecticut Educ. Ass'n v. State Bd. of Labor Relations, 498 A.2d 102 (Conn. App. Ct. 1985) (for purposes of realignment, administrators have dual rights—those of administrator and teacher).

136. *See, e.g.*, Musorofiti v. Board of Educ., 485 N.Y.S.2d 572 (N.Y. App. Div. 1985); Beeman v. Board of Educ., 494 N.Y.S.2d 27 (N.Y. App. Div. 1985); Strand v. Special School Dist. No. 1, 361 N.W.2d 69 (Minn. Ct. App. 1984).

137. Hanlon v. Board of Educ., 474 N.E.2d 407 (Ill. App. Ct. 1985).

138. Caso v. School Comm. of Waltham, 483 N.E.2d 1115 (Mass. App. Ct. 1985); Breslin v. School Comm. of Quincy, 478 N.E.2d 149 (Mass. App. Ct. 1985).

139. Jester v. Board of Educ., 486 N.Y.S.2d 484 (N.Y. App. Div. 1985) (counselor not cerified as social worker); Schimmel v. Board of Educ., 490 N.Y.S.2d 64 (N.Y. App. Div. 1985) (drivers education teacher not certified in industrial arts).

140. *Id. See also* Shearod v. Board of Coop. Educ. Servs., 486 N.Y.S.2d 62 (N.Y. App. Div. 1985) (position involving teaching not similar to nonteaching position).

141. DeSimone v. Board of Educ., 612 F. Supp. 1568 (E.D.N.Y. 1985).

142. 105 S. Ct. 1487 (1985).

A few additional cases illustrate a miscellany of procedural and substantive issues related to call-back rights; two of these illustrate that a "vacancy" for recall purposes arises upon the resignation of a teacher, but not when the teacher is on an extended leave because of illness.[143]

CONTRACTUAL DISPUTES

Board Policies and Contract Stipulations

Contract disputes concerning an applicant or employee's right to hold a particular position are an ever-present part of employee litigation. In 1985, an administrator showed that a valid contract was formed when he was offered reemployment by letter and accepted by a hand-written memorandum, despite the failure to use a state-approved form.[144] Another employee successfully regained her position when a jury determined that abandonment of her bartending job was not made a condition precedent to her employment as a bus driver.[145]

Among employees who were unsuccessful in asserting locally-based claims to particular positions were a tenured teacher whose withdrawal of her resignation was ineffective because it impliedly had been accepted when a replacement was hired,[146] and employees who had no contractual relationship with the state, no contract right to renewal, and no right to allege breach of contract (because of prior waiver).[147]

With regard to other terms and conditions of employment, it was

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143. Tomiak v. Hamtramack School Dist., 360 N.W.2d 257 (Mich. Ct. App. 1984) (teacher who refused recall can be required to apply for a discretionary leave of absence); Daul v. Board of Educ., 482 N.Y.S.2d 265 (N.Y. 1984) (teaching "vacancy" created by resignation entitled most senior teacher on preferred eligibility list to appointment); Weidman v. Brandon School Dist., 371 N.W.2d 910 (Mich. Ct. App. 1985) (teacher's absence because of illness created no legal "vacancy" mandating the recall of laid-off tenured teacher).

144. Board of Educ. v. Jennings, 701 P2d 361 (N.M. 1985).

145. Wilkerson v. School Dist. No. 15, 700 P2d 617 (Mont. 1985).

146. Braught v. Board of Educ., 483 N.E.2d 623 (Ill. App. Ct. 1985). *But cf.* California Teachers Ass'n v. Board of Educ., 209 Cal. Rptr. 655 (Cal. Ct. App. 1985) (teacher's withdrawal of resignation effective in absence of board acceptance).

147. Pordum v. State, 492 N.Y.S.2d 204 (N.Y. App. Div. 1985) (no breach of contract where reinstatement was barred by state commissioner pending outcome of fitness hearing and teacher thus had no employment relationship with state); Gardner v. School Dist. No. 55, 700 P2d 56 (Idaho 1985) (nonrenewal did not breach contract because superintendent had no renewable contract right); Siler v. Turnbull, 693 P.2d 1323 (Or. Ct. App. 1985) (by accepting head football coaching contract, teacher waived right to allege breach of oral contract to employment as athletic director).

held that a superintendent had lawful authority to modify a psychologist's job description despite the employee's attempt to condition his acceptance on a favorable job-description agreement negotiated between the superintendent and another psychologist.[148] Districts lost in four other cases, however, with one of these affirming a breach of contract where a board had adopted but not followed an evaluation policy applicable to probationary teachers subject to nonrenewal.[149]

Administrative Regulations and Statutory Provisions

Among cases reported in 1985, there were more contract disputes involving the interpretation and application of state statutes than local contract provisions, with the majority relating to the right to hold a particular position or to obtain particular wages. Of five miscellaneous terms and conditions of employment cases, one court held that a school district was not precluded by the continuing contract statute from modifying the supplemental contracts it awarded for extended duties,[150] and four courts held in favor of employees on various issues.[151] A total of six cases concerned the claimed right to hold a particular position. Two employees unsuccessfully claimed breach of contract when it was found that neither a probationary employee nor an at-will employee had statutory procedural rights;[152] and a teacher who moved to Massachusetts from Georgia pursuant to an oral agreement had no legal recourse when he was dismissed several weeks later.[153] In

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148. Jawa v. Board of Educ., 324 S.E.2d 161 (W. Va. 1984).

149. Belcher v. Jefferson County Bd. of Educ., 474 So. 2d 1063 (Ala. 1985). *See generally* Maddox v. St. Paul School Dist., 697 S.W.2d 130 (Ark. Ct. App. 1985) (ambiguity in contract construed against district); Pastor v. San Juan School Dist. No. 1, 699 P2d 418 (Colo. Ct. App. 1985) (backpay ordered where leave covered by maternity policy, not leave-without-pay policy); Benavides Indep. School Dist. v. Guerra, 681 S.W.2d 246 (Tex. Civ. App. 1984) (validity of employee's unilateral change in written contract at issue).

150. Issaquah Educ. Ass'n v. Issaquah School Dist. 411, 706 P2d 618 (Wash. 1985).

151. King v. Board of Educ., 486 A.2d 111 (Conn. 1985) (superintendent entitled to indemnification under statute protecting board employees when he was joined with the board as a defendant in action to nullify his resignation); Chandler v. Perry-Casa Pub. Schools Dist. No. 2, 690 S.W.2d 349 (Ark. 1985) (statutory authority to reassign negates legal injury); Wygant v. Victor Valley Joint Union High School Dist., 214 Cal. Rptr. 205 (Cal. Ct. App. 1985) (local salary policy inconsistent with statute requiring uniform compensation for equivalent years of training and experience); Lundberg v. Board of Educ., 487 N.Y.S.2d 306 (N.Y. Sup. Ct. 1985) (board had statutory authority to grant or deny teacher's leave request, not to modify it).

152. Eureka County School Dist. Bd. of Trustees v. Holbo, 705 P2d 640 (Nev. 1985); Tyson v. Hess, 487 N.Y.S.2d 206 (N.Y. App. Div. 1985).

153. McAndrew v. School Comm., 480 N.E.2d 327 (Mass. App. Ct. 1985).

the latter case, the court declined to estop the school district from denying the contract because doing so would frustrate statutory requirements designed to protect the public interest. Another employee, while entitled to reappointment because of an ineffective nonrenewal, relinquished that right by rejecting a proffered contract that omitted his previous coaching responsibilities:[154] the school district did have the right to reassign him. And employees seeking reinstatement to their previous positions were successful in three cases where failure to abide by statutory provisions voided a transfer, nonrenewal, and dismissal, respectively.[155]

Seven cases were reported in 1985 concerning individual employee wage disputes. One teacher who did not fulfill her statutory obligation to return to teaching following a sabbatical had to repay money to the district.[156] Two other teachers' claims also failed.[157] More successful were the two teachers granted backpay because of statutory violations by their districts,[158] and other teachers who were entitled to irrevocable transfer-credit rights and to a 15% statutory cost-of-living increase applicable to their supplemental salary as well as their regular salary.[159]

TENURE

"Tenure" is a statutory right to continuing contract status. One who has tenure is entitled to procedural due process protection and has certain rights that can be defeated only "for cause" (e.g., incompetency, immorality). Noncertificated employees can acquire tenure in some states; administrators can acquire tenure in many states; and teachers and supervisors can acquire tenure in most states. There are only a few states where tenure as a teacher is defined by the length of

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154. Grounds v. Tolar Indep. School Dist., 694 S.W.2d 241 (Tex. Civ. App. 1985).

155. Lavender v. McDowell County Bd. of Educ., 327 S.E.2d 691 (W. Va. 1984); Brennan v. Vinton County Local School Dist. Bd. of Educ., 480 N.E.2d 476 (Ohio 1985); Wren v. McDowell County Bd. of Educ., 327 S.E.2d 464 (W. Va. 1985).

156. Walter v. North Hills School Dist., 487 A.2d 85 (Pa. Commw. Ct. 1985).

157. Arfin v. Ambach, 488 N.Y.S.2d 869 (N.Y. App. Div. 1985) (waiver of right to transfer credit and delay in action precluded recovery under state statute); Alabama State Tenure Comm'n v. Shelby County Bd. of Educ., 474 So. 2d 723 (Ala. Civ. App. 1985) (transfer with loss of salary did not equal "loss of status" precluded by state statute).

158. Jennings v. Dumas Pub. School Dist., 763 F.2d 28 (8th Cir. 1985) (teacher entitled to backpay where nonrenewal violated statutory notice provision); Kipp v. Juniata County School Dist., 487 A.2d 444 (Pa. Commw. Ct. 1985) (permanent professional employee entitled to backpay equal to statutory minimum).

159. Greenwich Cent. School Dist. v. Ambach, 484 N.Y.S.2d 339 (N.Y. App. Div. 1985); Childers v. Morgan County Bd. of Educ., 465 So. 2d 378 (Ala. Civ. App. 1985).

service in particular disciplines or areas of instruction.

Some state statutes provide that an employee can acquire tenure either as a teacher or administrator and maintain that status despite subsequent vertical transfers between administrative and teaching ranks. In other states where both administrators and teachers are granted tenure, employees may be required to serve an additional probationary period upon transferring to another rank. This is most often true, however, when a teacher is promoted to an administrative position; administrators are more likely to be considered tenured "teachers" when downward transfers are necessary. The transferability of tenure status from district to district within a state also is governed by state law.

Tenure Status

The acquisition of tenure, and rights pursuant thereto, depends on the interpretation of state law. Courts are often required to assess whether the employee has served in a defined status, under enumerated conditions, for the applicable probationary period—which in many states is three years. Questions of status and conditions vary greatly from state to state, but most states require that employees serve a probationary period that ranges from two to five years.

In cases reported in 1985, central office positions were held to be administrative and not subject to tenure as an instructor, teacher, or principal "in the public schools" of Alabama, and an Alabama coach was ineligible for tenure under the teacher tenure act because no certification was required for coaching, as it was for teaching.[160] Three different states found that neither long-term substitutes, temporary teachers, nor paraprofessionals were eligible for credit toward tenure;[161] and another state court found that certified county employees could not acquire tenure unless they were in teaching positions (in contrast to district-level administrative and nonteaching personnel who were permitted to acquire tenure).[162] In the only case where employees successfully asserted that their status was covered by the tenure statute, it was held that title I teachers were, in fact, "teaching staff members."[163] On the other hand, teachers whose positions were

160. Alabama State Tenure Comm'n v. Singleton, 475 So. 2d 185 (Ala. Civ. App. 1984); Bryan v. Alabama State Tenure Comm'n, 472 So. 2d 1052 (Ala. Civ. App. 1985).

161. Bochner v. Providence School Comm., 490 A.2d 37 (R.I. 1985); Campbell v. Board of Educ., 333 S.E.2d 507 (N.C. Ct. App. 1985); Cook v. Board of Educ., 375 N.W.2d 740 (Mich. Ct. App. 1984).

162. Neumarkel v. Allard, 209 Cal. Rptr. 616 (Cal. Ct. App. 1985).

163. Rutherford Educ. Ass'n v. Board of Educ., 489 A.2d 1148 (N.J. 1985).

financed by federal funds explicitly were not covered by another state's teacher tenure statute.[164]

Of three cases dealing with various conditions precedent to tenure status,[165] one held that an eight week maternity leave taken pursuant to statute did not disrupt the "continuity of service" required to gain tenure.[166] However, the court did not determine if it would be necessary for the teacher to teach an additional full year to satisfy the three-year probationary period, because the teacher had done so.

There were eight cases where employees questioned whether they had satisfied the statutory probation period; four were decided against the employees and four in favor. Illustrative of the first group is one case where a teacher was denied credit toward tenure where she did not teach the full semester, and another where teachers who were nonrenewed effective at the end of their probationary period were precluded from attaining tenure.[167] Illustrative of the second group is a Minnesota case holding that a state statute did not prescribe that "teachers" (instructors and principals) serve an additional probationary period upon their vertical or horizontal transfer to new positions.[168]

Tenure by Default or Acquiescence

Both competent and incompetent employees sometimes obtain

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164. Board of Educ. v. Savino, 494 A.2d 1258 (Del. Super. Ct. 1985).

165. The first two were Long v. LaFourche Parish School Bd., 460 So. 2d 651 (La. Ct. App. 1984) (tenure rights to higher salary accrued although employee served as principal for two years and assistant principal, at same salary, for a third year), and Ramsay v. Sierra Vista Unified School Dist., 697 P.2d 343 (Ariz. Ct. App. 1985) (although tenured teacher's contract was revoked per statute [in the absence of timely acceptance], when another contract was offered, teacher's tenure rights were preserved).

166. Solomon v. School Comm., 478 N.E.2d 137 (Mass. 1985).

167. Lifson v. Board of Educ., 486 N.Y.S.2d 61 (N.Y. App. Div. 1985); Pookman v. School Dist., 483 A.2d 1371 (Pa. 1984). *See generally* Nessen v. Board of Educ., 491 A.2d 419 (Conn. App. Ct. 1985) (where probationary period consisted of three years of service under written contract, four years of such service interrupted by several years without a contract precluded the attainment of tenure); Kellerman v. Board of Educ., 367 N.W.2d 371 (Mich. Ct. App. 1985) (part-time teaching for 160 days for two school years was not equal to "two full school years").

168. Sweeney v. Special School Dist. No. 1, 368 N.W.2d 288 (Minn. Ct. App. 1985). *See generally* Wright v. Board of Educ., 491 A.2d 644 (N.J. 1985) (flexible tenure statute covering custodians did not preclude board from agreeing to tenure for all custodians after three years); Faison v. New Hanover County Bd. of Educ., 330 S.E.2d 511 (N.C. Ct. App. 1985) (statutory interpretation demonstrated that three-year term as supervisor was sufficient to protect employee from demotion); Breuhan v. Plymouth-Canton Community Schools, 359 N.W.2d 566 (Mich. Ct. App. 1984) (teacher who taught all but seven days of two-year period taught two "full school years").

tenure because of a district's oversight or negligence in following statutory procedures for securing or preventing the acquisition of tenure. For example, a teacher who had taught two years "without receiving notice of unsatisfactory performance," automatically achieved tenure at the end of the second year.[169] Likewise, an improper transfer of a principal during his third year was ineffective to deny tenure where tenure denial was only possible through the proper cancellation of the principal's contract.[170] In the last case, a district failed to give a probationary teacher, who was eligible for continuing appointment, written notice by a specified date of intent to require an additional year of probation.[171] The teacher acquired tenure by operation of law.

CERTIFICATION

Certification Standards

Only four cases dealing with certification standards were reported in 1985, and the latter three are more properly a question of standards for recertification. In the first case, a board of education was not estopped from removing a noncertified principal when his prior service as an administrative assistant was judged insufficient to meet supervisory and administrative certification requirements.[172]

In a New Mexico case, a former teacher who had been convicted of criminal sexual conduct with a child under thirteen met his burden of demonstrating rehabilitation for purposes of recertification.[173] In the absence of contrary evidence by the state, the favorable testimony of a clinical psychologist was held sufficient. On the other hand, the recertification of a school bus driver who underwent corrective heart surgery was denied on the basis of a statute precluding the qualification of those with a medical history of "coronary insufficiency."[174] The dissent argued that the corrected "coronary arterial obstruction" did not amount to a "coronary insufficiency" within the statute. Similarly, though a bus driver was found to be healthy, his license suspension was upheld where he had a history of myocardial infraction.[175]

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169. Breuhan v. Plymouth-Canton Community Schools, 359 N.W.2d 566 (Mich. Ct. App. 1984).

170. Debrow v. Alabama State Tenure Comm'n, 474 So. 2d 99 (Ala. Civ. App 1984).

171. State *ex rel.* Lee v. Bellefontaine City Bd. of Educ., 477 N.E.2d 1135 (Ohio 1985).

172. Morley v. Arricale, 482 N.Y.S.2d 483 (N.Y. App. Div. 1984).

173. Garcia v. State Bd. of Educ., 694 P2d 1371 (N.M. Ct. App. 1984).

174. Commonwealth v. Miller, 492 A.2d 121 (Pa. Commw. Ct. 1985).

175. Commonwealth v. Johnson, 489 A.2d 960 (Pa. Commw. Ct. 1985).

Decertification, Revocation, or Suspension

In one case, a teacher's attempt to regain his guidance position by decertifying himself in math, general science, and vocational electronics was unsuccessful.[176] In preserving the state's right to transfer a teacher among his areas of specialization, the court held that the teacher's liberty right to pursue his chosen occupation of guidance counselor was not implicated because he was free to seek such a post elsewhere.

Of the three revocation cases, one Florida case held that a teacher whose certification had been permanently revoked had no right even to apply for recertification.[177] The case suggests why another Florida teacher attempted, unsuccessfully, to surrender his teaching certificate before it could be permanently revoked on charges of sexual misconduct with students.[178] In the final case, the revocation of a school superintendent's certification was upheld for his falsification of attendance, transportation, and school lunch records.[179]

176. Audet v. Board of Regents, 606 F. Supp. 423 (D.R.I. 1985).
177. Longenecker v. Turlington, 464 So. 2d 1249 (Fla. Dist. Ct. App. 1985).
178. Couch v. Turlington, 465 So. 2d 557 (Fla. Dist. Ct. App. 1985).
179. Balentine v. Arkansas State Bd. of Educ., 684 S.W.2d 246 (Ark. 1985).

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BARGAINING

Charles L. Miller and Perry A. Zirkel

Introduction / 35
Constitutional Issues / 35
Authority to Bargain / 38
Recognition and Representation Issues / 39
    Unit Determination / 39
        Supervisory, Managerial, and Confidential Employees / 39
        Other Representation and Recognition Issues / 39
    Elections / 41
Rights and Obligations of Exclusive Bargaining Representatives / 41
    Union Rights / 41
    Union Security / 42
    Obligations of Exclusive Representatives / 43
Scope of Bargaining / 44
    Duty to Bargain / 44
    Mandatory Topics of Bargaining / 45
    Prohibited Topics of Bargaining / 46
    Permissive Topics of Bargaining / 46
Grievability and Arbitrability / 47
    Presumption of Arbitrability / 47
    Who Determines? / 51
    Procedural Issues / 51
    Management Prerogatives as a Bar / 53
    General / 54
Judicial Review / 55
    Arbitration Awards and Employment Relations Board Rulings / 55
        Standard of Review / 55
        Propriety of Awards / 57
    Statute-based Claims / 59
        Interpretation of Collective Bargaining Legislation / 59
        Interrelationship with Other Laws / 60
Impasse and Dispute Resolution / 62
    Fact Finding and Arbitration / 62
    Rights on Expiration of Contracts / 63
Concerted Activity / 64
    Strikes and Other Job Actions / 64

Miscellaneous Decisions / 66
Conclusion / 68

INTRODUCTION

Last year's conclusion to the chapter on collective bargaining urged school districts to solve their labor conflicts in litigation "only if they desperately have to." Unfortunately, the number of cases in litigation during 1985 was undiminished. Through the years in which collective bargaining has been in public schools, a gradual shift in the areas of conflict has taken place. In the early years, most litigation dealt with salary and fringe benefits along with the scope of bargaining issues. As this year's cases reveal, the issues dealing with contract management, that is making the contract work during its life, have come to the forefront in a plethora of grievance/arbitration litigation. Job security issues also have taken the lead from the salary and fringe benefit conflicts. In the review that follows, an example of virtually every possible dispute that can arise in educational labor relations seems to be present. This variety serves as a reminder that each state's collective bargaining laws is slightly different. Reliance on a decision from a state other than your own may prove to be unwise without parallel legislative language and history.

CONSTITUTIONAL ISSUES

During 1985 a variety of issues involving either state or federal constitutional rights arose. The issues dealt with distribution of union materials, implementation of fair share agreements, legality of picketing and leafleting outside a board member's personal business, and jurisdiction over labor relations between parochial schools and their lay teachers. Even the thought to be well understood practice of bargaining representatives collecting "fair share" fees from nonmembers, as delineated by the United States Supreme Court in *Abood v. Detroit Board of Education*,[1] is still being challenged from new and creative avenues.

In a case arising in Texas, which does not have a collective bargaining statute, the Fifth Circuit Court of Appeals was asked to review a suit brought by a teacher organization alleging that school policies restricting its access to school property and prohibiting its use of school facilities during school hours violated its members' constitu-

1. 432 U.S 209 (1977).

tional rights.[2] Specifically, the employee organization claimed that the school district policies violated the first and fourteenth amendment free speech, free association, and equal protection clauses, and the overbreadth and vagueness doctrines. The union argued that these policies, as interpreted and implemented by school officials, operated to deny teachers their right to discuss association business even during nonclass time, such as the lunch hour. Union representatives further contended that school officials had routinely granted access to school communications facilities to other commercial and civic organizations and that employee organizations were discriminatorily denied access. The school district counter argued that the schools are not a public forum and that reasonable alternative means of communications were available. Finally, the district contended that allowing employee organizations to use school facilities would disrupt the learning process.

The Fifth Circuit's review of the matter relied heavily upon the Supreme Court's decision in *Perry Education Association v. Perry Local Educators' Association*.[3] Under *Perry*, a right of access to public property, and the standard by which limitations upon such a right must be evaluated, differ depending upon the character of the property at issue. *Perry* delineates three types of public property for first amendment purposes: (1) public forums; (2) limited public forums; and (3) nonpublic forums. With regard to the communications instigated by outside representatives of the union who desired access to teachers and school communication facilities, the Fifth Circuit did not view the school district's selective visitation and mail policy as creating a public forum. However, with regard to the communications among the teachers employed by the district, the court pointed out that regulations of their expression must be drawn more narrowly than regulations on the speech of outside representatives.[4] The court held that policies which purport to deny teachers the right to discuss union business during nonclass time are unconstitutional. The restriction on the use of school media facilities by district teachers as it relates to "employee organizations" also was unconstitutional, inasmuch as no "material and substantial" disruption was shown.

By far the most litigation in the constitutional area arose over the implementation of fair share agreements. The 1977 Supreme Court

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2. Texas State Teachers Ass'n v. Garland Indep. School Dist., 777 F.2d 1046 (5th Cir. 1985).

3. 460 U.S. 37 (1983).

4. *See, e.g.*, Country Hills Christian Church v. United States School Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983).

decision in *Abood*[5] that such agreements do not constitute a *per se* violation of nonmembers rights has been applied to a case-by-case, state-by-state basis. For example, California's state's highest court decided that employees covered by a union shop or agency shop clause have a right under the first amendment to object to use of their money for political or ideological purposes which they oppose.[6] The court decided that the state statute which authorizes union shop or agency shop agreements does not on that account impinge upon protected rights of the association.

In another California case, a nonunion member challenged the withholding of a portion of his paycheck as a "service fee" and the use of that fee by the union for purposes not directly related to negotiations, contract administration, and grievance handling.[7] The state's intermediate appellate court ruled that (1) although the free rider test is the same for both public-sector and private-sector expenditures, results of the test will depend upon peculiarities of the duties of the exclusive representatives in the two sectors; (2) the union has the burden of proving how the employees' fees have been spent; (3) lobbying and electioneering on matters of employer-employee relations and school financing are activities reasonably employed to implement or effectuate the duties of a public school employee union; (4) where the union is chosen in its affiliated status to be the exclusive representative of the unit, assessment of dues and fees to defray all costs properly assessed against nonmembers is permitted, regardless of whether a local or national affiliate provided benefits and assessed dues and fees; and (5) the automatic deduction of service fees was proper.

In another application of *Abood*, the New Jersey Supreme Court decided that a statutory provision permitting the union to apply fees of nonunion public employees to certain lobbying expenditures was not facially invalid.[8] The court also ruled that the demand-and-return system mandated by statutory provision, which required labor unions to refund agency shop fees used for impermissible political purposes, was not unconstitutional on its face. The court concluded, however, that such a system was constitutional as applied only when the fee is used for objectives germane to collective negotiations or conditions of employment, because collection of nonmember fees for these purposes promotes governmental interest in achieving stability in labor relations.

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5. See *supra* note 1.
6. San Jose Teachers Ass'n v. Superior Court, 700 P2d 1252. (Cal. 1985).
7. Cumero v. Public Employment Relations Bd., 213 Cal. Rptr. 326 (Cal. Ct. App. 1985).
8. Board of Educ. of Boonton v. Kramer, 494 A.2d 279 (N.J. 1985).

As a separate issue, the constitutionality of an injunction prohibiting picketing and leafleting outside the personal business offices of governing board members of a school district was challenged in California.[9] Specifically, the primary issue in this case was whether these concerted activities of school employees involved in a labor dispute with a school district constitute a corrupt practice or are otherwise unlawful and may, therefore, be restricted without infringing first amendment rights. The court reviewed the district's contention that the union activity is constitutionally unprotected because it undermines the integrity of the local legislative process as being irreconcilable with the jurisprudence of the first amendment, which teaches that the exposure of elected officials to public criticism enhances rather than defeats the integrity of representative government. The court disagreed, however, and concluded that the picketing and leafleting were not unlawful. The trial court's injunction against such activities was held to be unconstitutional.

Finally, in the constitutional area for 1985, the Second Circuit ruled that the duty of church-operated schools to bargain with labor unions pursuant to New York's collective bargaining statute does not violate the first amendment's religion clauses.[10] Focusing on the third prong of the tripartite test for establishment clause cases, the court found that New York's labor relation board's relationship with religious schools concerning mandatory subjects of bargaining, all of which are secular, does not create a degree of surveillance necessary to find excessive entanglement. Furthermore, the court ruled that the state labor relations board's jurisdiction over the dispute between the church-operated school and the lay teachers' union did not violate the free exercise clause where collective bargaining was not claimed to be contrary to the beliefs of the church. Even if the exercise of the state labor relations board's jurisdiction had an indirect and incidental effect on employment decisions in parochial schools relating to religious issues, the court concluded that this minimal intrusion was justified by the state's compelling interest in collective bargaining.

AUTHORITY TO BARGAIN

It would appear that the authority to bargain, where authorized by state statute, has become well established. This is the second year

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9. Pittsburg Unified School Dist. v. California School Employers Ass'n, 213 Cal. Rptr. 34 (Cal. Ct. App. 1985).

10. Catholic High School Ass'n v. Culvert, 753 F.2d 1161 (2d Cir. 1985).

in a row that no reported case dealing with public employees' rights to engage in collective bargaining with duly elected agents of the employers has been decided.

Recognition and Representation Issues

Unit Determination

Supervisory, Managerial, and Confidential Employees. Missouri's highest court affirmed a lower court ruling that had upheld a State Board of Mediation decision that secretaries who were assigned to administrative offices of the school district and who occupied positions of trust with the superintendent and with the members of the board of education primarily responsible for developing the district's labor relations strategies were confidential employees and thus properly excludable from the bargaining unit.[11] Since principals and assistant principals were the sole representatives of the district with whom teachers and other school personnel had daily contact and were indispensable in effectuating labor relations policies of the district, their secretaries also were held to be confidential.

Illustrating the variety among states, however, Florida's intermediate appellate court held that school superintendents' secretaries were not excludable from a collective bargaining unit as confidential because the secretaries were neither involved in nor had access to confidential documents or information relating to any management policies in the field of labor relations, collective bargaining negotiations, or employee grievances.[12] Although the secretaries did have access to certain sensitive information, such as promotions, transfers, personnel files, complaints, and disciplinary actions, the court did not regard this information as providing an employee organization with any advantage at the bargaining table because these matters are not subject to collective bargaining in Florida.

Other Representation and Recognition Issues. The New Hampshire Supreme Court upheld that state's Public Employee Labor Relations Board's order that a school administrative unit negotiate with a bargaining unit made up of educational support person-

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11. Missouri NEA v. Missouri State Bd. of Mediation, 695 S.W.2d 894 (Mo. 1985).

12. School Bd. of Polk County v. Polk Educ. Ass'n, 480 So. 2d 1360 (Fla. Dist. Ct. App. 1985).

nel.[13] The court based its decision on technical-procedural grounds reasoning (1) that the labor board has broad subject matter jurisdiction to determine and certify bargaining units, and (2) that regardless whether it was wrong as a matter of law when the labor board defined member districts of the school administrative unit as one public employer for purposes of collective bargaining, such was not a jurisdictional issue, but rather an issue of law which should have been raised at the certification proceedings. When it was not raised at that time, or by the appellate procedure established by statute, the issue was waived.

A recurring question concerns the appropriateness of a bargaining unit that contains both professionals and paraprofessionals. The Minnesota Supreme Court determined that paraprofessionals hired under a federally funded remedial program must establish a separate bargaining unit and not be part of a teachers' bargaining unit.[14] The court considered the fact that these paraprofessionals were not required to be licensed, because they were not "teachers" as defined in provisions of Minnesota's Public Employment Labor Relations Act, regardless of their job function.

An Indiana court of appeal affirmed that state's Education Employment Relations Board (EERB) decision that a special services unit was a school corporation for purposes of collective bargaining.[15] The court ruled that this special services unit met the statutory definition of a "school corporation," which included a school for handicapped children established or maintained by two or more school corporations, even though the unit was comprised of two state hospitals in addition to six school corporations. The court also rejected the unit's procedural attack. First, in unit determination proceedings, although an agent of the EERB may direct an election, a representative is not certified until after the parties have an opportunity to object to the entire board. Therefore, no authority was improperly delegated to an agent of EERB. Second, the court found that the failure of an agency to make precise findings does not always prevent adequate review. Where an agency made alternate findings, but failed to make findings of the underlying facts and grounds for the decision, the error was harmless.

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13. *In re* SAU No. 21 Joint Bd. Negotiating Team, 489 A.2d 112 (N.H. 1985).
14. Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527 (Minn. 1985).
15. Madison Area Educ. Special Serv. Unit v. Indiana Educ. Employment Relations Bd., 483 N.E.2d 1083 (Ind. Ct. App. 1985).

Elections

A teachers' union in Louisiana filed suit to force the school board to prepare a referendum to determine whether the school board should recognize the teachers' union and bargain with it.[16] Reversing the election order of the Louisiana Court of Appeals, the state supreme court held that the school board lacked authority to call the referendum, but recognized the power of the state legislature to authorize parish or municipal wide referenda on issues of purely local interest, such as taxation for local purposes and alcoholic beverage control. Such local option laws have been traditionally upheld in Louisiana as lawful delegations of legislative power. Nevertheless, the court reasoned that the legislature's constitutional authority to call such a local election does not mean that a parish school board is clothed with a similar grant of power; a school board, with narrowly and specifically defined powers, lacks both statutory and constitutional authority to refer a decision to its electorate.

Rights and Obligations of Exclusive Bargaining Representatives

Union Rights

Whether a union is entitled to have state or national representatives meet with local members during school hours was the only union rights issue judicially decided during 1985. For the most part, objections to bargaining representatives' right to represent members' interests in wages, hours, and conditions of employment in general rarely arise.

A school entity in Pennsylvania sent a letter to the recognized teachers' association stating that (1) association members are prohibited from conducting association business during normal school hours, and (2) the union field representatives are prohibited from entering the school buildings during the normal work day to engage in association activities.[17] An arbitrator upheld the association grievance against this policy, because a "past practice" of permitting union representatives to meet during their preparation or lunch periods existed

16. St. John the Baptist Parish Ass'n of Eucators v. Brown, 465 So. 2d 674 (La. 1985).

17. Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Educ. Ass'n, 489 A.2d 945 (Pa. Commw. Ct. 1985).

and had evolved into an employment condition incorporated into the contract. A state court acknowledged that the school entity had the rights, pursuant to the School Code, to limit the union's field representative from entering its buildings during normal working hours. Nevertheless, the court ruled that it would not supersede a provision in a collective bargaining agreement or, in this case, a past practice which has been implicitly incorporated therein, except where the conflict is explicit and definitive.[18] Therefore, the arbitrator's award was affirmed.

Union Security

The area of union security is one of utmost importance to state and national union representatives, although local union representatives may be more prone to put an immediate priority on the salary and fringe packages. The area of fair share or agency shop agreements, wherein nonmember employees are required to contribute funds to the union treasury already has been addressed under Constitutional Issues.

However, a variation of the dues deduction of nonmembers touches on the union security issue from a different angle. In a school district in Colorado, a provision of a collective bargaining agreement provided for automatic deduction of union dues from employees' paychecks and an opt-out provision that stated a procedure for exemption from the automatic deduction.[19] Nonunion members contended that the exercise of the revocation procedure required them to disclose their ideological preferences and is, thus, a violation of their freedom of association and expression rights. The court found that they did not have to reveal political or ideological affiliation other than union nonmembership in exercising the opt-out provision and were not subject to harassment by being required to appear in person at a site designated by the union to declare their status. The failure of the nonunion members to effectively allege the manner in which their associational rights were impaired by the opt-out provision distinguished this case from *N.A.A.C.P. v. Alabama*[20] which compelled disclosure of membership list. The allegations were, thus, insufficient to state a *prima facie* claim of a violation of their right of free association and expression.

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18. *In re* County of Erie Appeal, 455 A.2d 779 (Pa. Commw. Ct. 1983).
19. Opie v. Denver Classroom Teachers Ass'n, 701 P.2d 872 (Colo. Ct. App. 1985).
20. 357 U.S. 449 (1958).

Obligations of Exclusive Representatives

Along with the rights and security that the collective bargaining process can bring to a union, obligations also are required. In Alabama, a classified school employee brought action against her union, alleging that the union wrongfully refused her request for legal assistance when she was fired.[21] The trial court issued a summary judgment in favor of the union, finding no genuine issue of material fact, and concluded that the action was time barred by a federal statute of limitations. The Supreme Court of Alabama ruled that the statute of limitations could not in this case be the basis for the trial court's granting a summary judgment. The union filed an answer without an affirmative pleading of the statute of limitations, and then attempted to raise the defense in their summary judgment motion. According to Alabama case law,[22] this procedure was defective. The court also rejected the alternative basis for granting the summary judgment motion (i.e., that there was no genuine issue of material fact). The employee's failure to offer anything other than a base response to the union's claim that the employee had never requested legal assistance was fatal. In the absence of the plaintiff-employee offering any affidavits or other testimony to contradict the evidence of the defendant-union, the court explained that it had no alternative but to consider that evidence uncontroverted.

The union's duty of fair representation also arose in two Michigan cases. In one case, a teacher filed a grievance over compensatory time.[23] The union represented him through the first three steps of the grievance procedure. While the original grievance was pending, the teacher was reprimanded for failure to follow orders at work. The union again filed a grievance on behalf of the employee, but the grievant failed to appear for any further grievance proceedings. The union then discontinued representing the teacher. The teacher filed a charge against the union with the Equal Employment Opportunity Commission (EEOC), and a settlement with a nonadmissions clause was reached. The teacher then filed a complaint against the union alleging that it had breached its duty of fair representation. The court granted a motion for summary judgment in favor of the union on the ground that the teacher's claim was barred by a six-month period of

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21. Wallace v. Alabama Ass'n of Classified School Employees, 463 So. 2d 135 (Ala. 1985).

22. Bechtel v. Crown Petroleum Corp., 451 So. 2d 793 (Ala. 1984).

23. Ray v. Organization of School Adm'rs and Supervisors Local 28, 367 N.W.2d 438 (Mich. Ct. App. 1985).

limitations and that the filing of the EEOC charge did not toll the limitations period.

The other Michigan case involved a teacher who had been laid off and who later alleged that the union had breached its duty of fair representation.[24] The sole issue on appeal was whether the circuit court had jurisdiction over the case, or whether the state Employment Relations Commission had jurisdiction. The intermediate appellate court ruled that the state Employment Relations Commission had exclusive jurisdiction to decide the teacher's duty of fair representation claim as well as her concomitant claims against the school district and the union's executive director. The court did not view the concomitant claim that the employer had breached the collective bargaining agreement, thus raising common law rights as well as rights granted under the state's Public Employment Relations Act, as defeating the commission's exclusive jurisdiction.

SCOPE OF BARGAINING

Duty to Bargain

Very little activity occurred in the area of duty to bargain during 1985. In Rhode Island, the state's highest court ruled that a regional school district could neither alter nor evade valid contractual obligations by refusing to sign a bargaining agreement which the school committee had negotiated with the teachers' association and which incorporated the terms of an arbitration award containing provisions for a three-step pay raise.[25] The school committee argued that because the appropriating authority is a body distinct from the school committee, any contracts with the teachers or others are subject to the appropriating authority's financial meeting. They argued that the appropriating body has absolute authority in financial matters. The court relied on state statute to conclude that since school committees are authorized by law to enter into binding agreements, the community is bound to fund that agreement whether that authority is a city or town council, a financial town meeting, or a district financial meeting. To conclude otherwise, the court explained, would completely negate the statutory power of the school committee to bargain and to contract.

In Michigan, a school district automatically renewed an existing

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24. Profitt v. Wayne-Westland Community Schools, 364 N.W.2d 359 (Mich. Ct. App. 1985).

25. Exeter-West Greenwich Regional School Dist. v. Exeter-West Greenwich Teachers' Ass'n, 489 A.2d 1010 (R.I. 1985).

collective bargaining agreement and then refused to bargain due to an alleged lack of timely notice of nonrenewal by the union.[26] The old contract had a termination clause which contained the following language:

> This agreement and its provisions shall become effective August 21, 1980, and remain in full force and effect through August 20, 1982, and thereafter for successive two (2) years unless notice of termination is given in writing by either authorized party to the other thirty days prior to its normal date of renewal.

Thus, the contract provided that it would automatically renew for a two-year period unless written notice of contract termination was given by either party thirty days prior to August 20, 1982. On September 1, 1982, the union made its first contact. The appellate court ruled that since the union filed for negotiations forty-three days after it was required to do so, the contract was renewed under the same conditions and durations as it had previously been. The court reasoned that the union has an obligation to abide by the contract terms, just as the school district must.

Mandatory Topics of Bargaining

In most collective bargaining settings today, the issue of mandatory topics of bargaining is generally not in dispute. General guideposts have been established at the state level, and local dynamics have largely taken care of the rest. However, in an era of declining enrollments and resulting furloughs, the negotiability of layoff procedures is a priority issue. A Connecticut case is illustrative. The intermediate appellate court was asked to decide which bargaining representative—the administrative organization, the teacher organization, or both—had the right to negotiate a layoff procedure that will determine the circumstances under which displaced administrators may bump teacher bargaining unit members.[27] The court could not resolve the issue by merely applying the general rule that mandatory subjects between an employer and the bargaining representative for a particular unit are only those subjects which concern the conditions of employment of the employees in that bargaining unit, because here the subject in question does not impact only the members of a single

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26. Capac Bus Drivers Ass'n v. Capac Community Schools Bd. of Educ., 364 N.W.2d 739 (Mich. Ct. App. 1985).

27. Connecticut Educ. Ass'n v. State Bd. of Labor Relations, 498 A.2d 102 (Conn. Ct. App. 1985).

bargaining unit. It is obvious that the conditions of employment of both the administrative unit and teacher unit members are affected by procedures that determine bumping rights for displaced administrators *vis a vis* members of the teacher unit. The court concluded that the legislature in Connecticut did not intend to require that cross-unit bumping questions can be resolved by ensnarling school boards and bargaining representatives in multilateral negotiations. The court applied the principle that the opportunity of a displaced administrator to bump into a teacher unit position constitutes a benefit, not a detriment, to a displaced administrator. The court then ruled that the layoff procedure was a mandatory subject for bargaining with the teacher unit only.

Prohibited Topics of Bargaining

No case was reported where proposals were ruled to be prohibited under state collective bargaining statutes. Precedents and practices apparently are absorbing any conflicts short of litigation. It may be that the parties with the maturity of experience have become more sophisticated in making their proposals meet the typical statutory criteria of hours, wages, and terms and conditions of employment.

Permissive Topics of Bargaining

The negotiability of reimbursement for unused sick leave and severance pay was raised in Iowa.[28] During the negotiations process, the association introduced proposals for reimbursement for unused sick leave and severance pay. The employer contended that it was not obligated to bargain on these items and filed a petition for expedited resolution of the matter with the Public Employment Relations Board. The board ruled that both proposals were permissive, not illegal or mandatory subjects of bargaining. Unlike the National Labor Relations Act, the Iowa statute specifically lists items considered mandatory. Interpreting this distinction as evidencing legislative intent, the Iowa appellate court concluded that the omission of these two items from the statutory listing made them permissive, rather than mandatory, subjects of bargaining.

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28. Professional Staff Ass'n of Area Educ. Agency 12 v. Public Employment Relations Bd., 373 N.W.2d 516 (Iowa Ct. App. 1985).

GRIEVABILITY AND ARBITRABILITY

The grievance arbitration process of collective bargaining has come to the forefront in the past few years as a way for both parties to clarify the intent of contractual language. Even where its intent was clear during the negotiations, some language has lain dormant for years past the point of the parties' clear memories or records. When disputes subsequently arise, the prevailing forum for resolving them is arbitration.

Many of the arbitration awards subject to judicial review in 1985 dealt with employee discipline and termination. In the early years of collective bargaining in the school, the arbitration process seemed to be used more to clarify salary and benefit issues than job security issues.

Presumption of Arbitrability

Although on balance the 1985 decisions continued the judicial presumption favoring arbitrability, the presumption was not effective in a few cases, which are included herein.

In New York, a school district decided, based on continuity of learning experience for a kindergarten class, to continue a teacher in her kindergarten teaching position rather than recall the most senior excessed elementary teacher in the middle of the term when the position became vacant.[29] The senior teacher filed a grievance, and the arbitrator upheld it based on the contract. New York's trial court vacated the arbitrator's award, ruling that the issue was nonarbitrable because it concerned school district responsibility to maintain adequate standards in the classroom. Pointing out that the contract specifically restricted the arbitrator with regard to any matter involving board discretion, and that prior New York court decisions established a public policy exemption for personnel assignments, the court ruled that an arbitrator may not infringe on such substantive issues without violating public policy.

In Massachusetts, a school committee failed to appoint a former junior high unit director or an elementary school principal to a position of assistant high school principal, instead appointing an individual with less seniority. A state intermediate appellate court ruled that the grievance filed on behalf of the two unsuccessful candidates

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29. Three Village Teachers Ass'n v. Three Village Cent. School Dist., 494 N.Y.S.2d 644 (N.Y. Sup. Ct. 1985).

was only arbitrable under the collective bargaining agreement as to whether reasonable steps were taken to ensure consideration in good faith of their qualifications to fill the positions, but not as to whether the grievants should have been chosen for the position.[30] Viewing public policy like the above mentioned in New York, the Massachusetts court reasoned that the relative qualifications of the applicants is a decision for the school committee, not for the arbitrator, who may not intrude into the committee's exclusive domain.

Similarly splitting an issue into arbitrable and nonarbitrable components, Massachusetts' highest court ruled that an arbitrator exceeded his powers in ordering a teacher's recall because such recall was analogous to an appointment decision and, therefore, fell within the exclusive domain of the school committee.[31] However, the court let stand the awarding of damages to the teacher for the district's failure to follow the recall provision of its collective bargaining agreement, reasoning that the award of damages did not force the school committee to surrender any of its management prerogatives.

Alaska's highest court allowed a nontenured teacher to submit his grievance, arising from the school district's alleged violation of nonretention procedures, to an arbitrator.[32] However, the court ruled, under state statute providing that nontenured teachers are subject to renewals for any cause, that the arbitrator may only recommend that the teacher be reinstated.

In two separate cases in New York, the issue of placing letters of reprimand or derogatory material in an employee's file was found arbitrable. One case resulted when a student died while participating in the school's football program. It was later found that the coaches had not made sure the students had been given the mandated physical examination prior to participation nor had they obtained parental consent for participation, as required by school policy.[33] The superintendent issued letters of reprimand and placed them in the employees' personnel files. The coaches' grievance was processed to the point of arbitration of the issue. The arbitration clause of this particular contract was as follows:

> Grievance shall mean any claimed violation, misinterpretation, or inequitable application of the existing agree-

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30. School Comm. of Peabody v. International Union of Elec., Radio and Mach. Workers Local 294, 475 N.E.2d 410 (Mass. App. Ct. 1985).

31. School Comm. of Holbrook v. Holbrook Educ. Ass'n, 481 N.E.2d 484 (Mass. 1985).

32. Jones v. Wrangell School Dist., 696 P2d 677 (Alaska 1985).

33. Board of Educ. v. Yonkers Fed'n of Teachers, 488 N.Y.S.2d 731 (N.Y. App. Div. 1985).

> ment, laws, rules, procedures, regulations, administration orders, or work rules of the Board or a department thereof; provided however, that such terms should not include an action against disciplinary proceedings or any other matters which are otherwise reviewable pursuant to law, or any rule or regulation having the force and effect of law. The denial of tenure is in no way to be construed as a grievance.

The court had no problem concluding that based on the above language the letter of reprimand was arbitrable, at least to the point of leaving to the arbitrator the determination of whether these letters constituted discipline or merely evaluation.

The second New York case arose out of the failure of the employing board to remove certain memoranda claimed to be derogatory from the personnel files of a teacher and a guidance counselor.[34] The parties' collective bargaining agreement included the following provision: "No material derogatory to a teacher's character or personality will be placed in their [sic] confidential personal file. This section shall not be interpreted to preclude the filing of evaluation forms." The board maintained that the matter was not arbitrable, arguing that the arbitrator might make an award that could be in violation of public policy. The court rejected this argument as prematurely speculative, concluding that it did not justify judicial intervention in the arbitration process at this stage.

The state court used virtually identical reasoning in a separate case. The teacher in this case had been receiving his salary while out due to an injury sustained on the job. At the end of the year, the district ceased paying the salary in alleged violation of the collective bargaining agreement. The court ruled that the matter is arbitrable and that subsequently the district may file for review if it feels the arbitrator's action violates public policy.[35]

Other 1985 decisions similarly continued the tradition favoring arbitrability. In view of the provisions of a collective bargaining contract, a New York appellate court allowed a grievance arising out of a denial of a teacher's request for reassignment to proceed to arbitration. Like the preceding New York case, the court provided limits, pointing out that the award would be subject to appropriate judicial

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34. Board of Coop. Educ. Serv. v. BOCES II Teachers' Ass'n, 488 N.Y.S.2d 797 (N.Y. App. Div. 1985).

35. Copiague Union Free School Dist. v. Copiague Teachers' Ass'n, 492 N.Y.S.2d 429 (N.Y. App. Div. 1985).

action on a motion to confirm or vacate should it impinge upon nondelegable duties of the board.[36]

Somewhat similarly, a Maryland appellate court concluded that a grievance concerning classroom observations was arbitrable despite the public policy argument of the school district.[37] The court agreed with the local school district that state law forbids the bargaining away of educational policy, but added there is no prohibition that would preclude bargaining on matters dealing with implementation of that policy. Illustrating the general trend, the court cited the following language from a previous Maryland decision:

> We are persuaded that when the language of an arbitration clause is unclear as to whether the subject matter of the dispute falls within the scope of the arbitration agreement, the legislative policy in favor of the enforcement of agreements to arbitrate dictates that ordinarily the question of substantive arbitrability initially should be left to the decision of the arbitrator. Whether the party seeking arbitration is right or wrong is a question of contract application and interpretation for the arbitrator, not the court, and the court should not deprive the party seeking arbitration of the arbitrator's skilled judgment by attempting to resolve the ambiguity.[38]

In an aforementioned[39] Pennsylvania decision, a dispute as to whether a union field representative could meet with members of the union on school property during school hours was found to be arbitrable. The court considered the issue to concern an employment condition and, therefore, to be properly put before an arbitrator. The court cited precedent from the Pennsylvania Supreme Court, which declared that "Pennsylvania labor policy not only favors but requires the submission to arbitration of public employee grievances 'arising out of the interpretation of the provision of a collective bargaining agreement.' "[40]

Similarly, a Florida appellate court held that a claim that a school board violated its own policy and past practices by not providing teachers with notice of responsibility to verify prior experience so as to

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36. Dutchess County Bd. of Coop. Educ. Serv. v. Dutchess County Bd. of Coop. Educ. Serv. Faculty, 490 N.Y.S.2d 806 (N.Y. App. Div. 1985).

37. Howard County Bd. of Educ. v. Howard County Educ. Ass'n, 487 A.2d 1220 (Md. Ct. Spec. App. 1985).

38. Gold Coast Mall v. Larmar Corp., 468 A.2d 91 (Md. 1983).

39. See *supra* note 17 and accompanying text.

40. Board of Educ. of Philadelphia v. Federation of Teachers Local No. 3, 346 A.2d 35, 39 (Pa. 1975).

receive higher placement on the contract salary schedule, with the corresponding higher salary entitlement under the contract terms, fell within contractual provisions defining a grievance subject to arbitration as a dispute between employer and employee involving misinterpretation or application of the collective bargaining agreement.[41]

Employee dismissals continue to be frequently challenged in the arbitration forum, where arbitrability is often raised by the board as a threshold defense. In contrast to the aforementioned decisions that rejected or refused arbitrability, Iowa's Supreme Court distinguished termination at any time for just cause, which is statutorily excluded from the arbitration arena, from nonrenewal or RIF at the end of a school year, which was grieved in the case in question.[42] Thus, the court concluded that the teacher was entitled to enforce the arbitration clause in the collective bargaining agreement.

Who Determines?

The hierarchy in labor relations to make decisions as to the arbitrability of issues flows in ascending order from arbitrators to, where applicable, public employment relations boards, and finally to the court. As illustrated by the above cited language from a Maryland court, the judiciary tends to delegate and defer to arbitrators' decisions concerning arbitrability as well as concerning the merits.

Another example of this deference is found in an Oregon case dealing with arbitration for a teacher charged with improperly disciplining a student.[43] A state appeals court held that the substantive review by the Employment Relations Board of the merits of an arbitration award is appropriately limited to inquiry as to whether the award is repugnant to the law of that state and does not entail a broader scope of review. Furthermore, the court concluded that although the Employment Relations Board is authorized to decide whether an unfair practice has occurred, the board may not make a determination totally independent of the arbitrator as to whether the arbitrator has contractual authority to decide the issues.

Procedural Issues

Both parties in the bargaining arena are becoming more and

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41. Burt v. Duval County School Bd., 481 So. 2d 55 (Fla. Dist. Ct. App. 1985).
42. Waterloo Educ. Ass'n v. Waterloo Community School Dist., 372 N.W.2d 267 (Iowa 1985).
43. Beaverton Educ. Ass'n v. Washingtion County School Dist. No. 48, 708 P2d 633 (Or. Ct. App. 1985).

more aware of the need to adhere to procedural requirements, including time lines. Nevertheless, arbitration tends to be less strict than administrative and judicial proceedings. The aforementioned presumption in favor of arbitrability is evident with regard to procedural, not just substantive, arbitrability. The following two cases are illustrative.

A school bus driver in New York was subjected to a disciplinary hearing under state statute and did not appeal that decision. He then sought arbitration claiming that he had been dismissed without just cause. The school board argued that his grievance was nonarbitrable on procedural grounds, claiming that his resort to statutory proceedings established a waiver. A state intermediate appellate court rejected this argument (1) where the collective bargaining agreement between the driver's union and the school district afforded both the statutory avenue of review and the alternative of arbitration of "just cause" grievances, and (2) where the school district had agreed to hold the grievance in abeyance until disposition of pending criminal charges against the driver and to permit the union to choose arbitration after disposition of the criminal charges.[44]

Similarly, Connecticut's highest court ruled that an arbitration panel which rendered a decision approximately six months after the final arbitration hearing was not untimely under a contractual provision that the arbitrator "shall be requested" to render the award as quickly as possible, but in no event more than thirty days from filing posthearing briefs, or sixty days after the final hearing, whichever come sooner.[45] The court technically interpreted the language as imposing no affirmative obligations on the arbitrator to act; rather, the time limit began to run upon request of one or both parties, and there was no evidence that such a request was ever made.

In contrast, consider the following examples from the administrative arena. In Massachusetts, a public school teacher and nonunion member brought a prohibited practice complaint before the state's Labor Relations Commission.[46] He claimed that the union's demand of an agency fee in an amount equal to full union membership dues was in excess of the fee allowed under the commission's regulation. The commission dismissed the complaint without a hearing for the reason that the employee had failed to file his complaint within the forty-five day period prescribed by regulation or to show good cause warranting a

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44. Granville Cent. School Dist. v. Granville Non-Instructional Employees Ass'n, 494 N.Y.S.2d 218 (N.Y. App. Div. 1985).

45. Board of Educ. of New Haven v. AFSCME Council 4, 487 A.2d 553 (Conn. 1985).

46. Lyons v. Labor Relations Comm'n, 476 N.E.2d 243 (Mass. App. Ct. 1985).

waiver of the forty-five day filing requirement. The court upheld the Labor Relations Commission's decision on timeliness, restating that there is nothing to suggest that forty-five days is too short a period to allow full assertion of a dissenting employee's rights.

Procedures tend to be similarly strict at the judicial level. For example, a Florida appeals court held that jurisdiction of an arbitrator to enter an award in favor of teachers in a salary dispute could not be challenged by the school board where it failed to comply with the ninety day rule set by statute for contesting awards and thus failed to comply with the very condition on which the right to relief was explicitly conditioned.[47]

However, equitable considerations sometimes provide some flexibility. For example, a Pennsylvania court held that a school district which improperly utilized service by regular mail, rather than deputized mail, for review of an arbitrator's award was entitled to have its petition reissued in order to effectuate proper service, even though the thirty day period within which to effect service had expired, where the school district did not seek to stall legal machinery by its action.[48]

Management Prerogatives as a Bar

Inasmuch as the inherent, and sometimes explicit, right of boards as employers to control their employees is a limit on the employees' statutory right of collective bargaining, as a counterweight to "conditions of employment," it should be no surprise that perceptions of what is inherent managerial prerogative differs between unions and employers.

The section on Presumption of Arbitrability reveals that the courts regard this doctrine as applicable, at least to some extent, to school district decisions relating to hiring and firing. In deciding whether an arbitrator's award impinged upon the board's nondelegable duties, for example, the aforementioned[49] analysis by New York's intermediate appellate court may be summarized in two parts:

> (1) The authority to assign and reassign teachers is essential to maintaining adequate standards in the classroom and is a nondelegable responsibility imposed upon the school superintendent subject to approval of the

47. Burt v. Duval County School Bd., 481 So. 2d 55 (Fla. Ct. App. 1985).

48. Big Beaver Falls Area School Dist. v. Big Beaver Falls Educ. Ass'n, 492 A.2d 87 (Pa. Commw. Ct. 1985).

49. See *supra* note 36 and accompanying text.

board of education. Public policy prevents a school district from bargaining away this responsibility. The arbitrator, therefore, had no power to direct the board to retain the grievant in his assignment as concert band director.

(2) The board, however, by agreement, may establish procedural rules regulating the right to reassign teachers, and the enforcement of these rules is a proper subject for arbitration.[50]

As a second example from the aforementioned[51] cases, Alaska's nonretention of a nontenured teacher is arbitrable, but the ultimate remedy available to the arbitrator in such a case must be subject to the management rights restrictions of state statute. An arbitrator might recommend that the school board exercise its discretion to reinstate an employee, but, the court concluded, the legislative edict is clear that a school district cannot negotiate away its authority to decide tenure, nonretention, reinstatement, or other matters concerning education policy or management prerogatives.

General

When conflicts arise between state statute and the grievance arbitration clauses of contracts, the question often occurs as to which forum is applicable. Finding that a school district's decision not to renew a teacher's contract was a mere pretext for retaliating against the exercise of her right to file a grievance under the Public Employment Labor Relations Act of Minnesota, the state's highest court decided that the district's action was not reviewable under statutory standards for probationary teachers but was a grievable matter.[52]

In addition to the New York decision summarized above,[53] and the Pennsylvania case summarized below,[54] another case from the former state illustrates that in some circumstances both forums may be applicable. In this other case, a union after pursuing a grievance through the first three levels of the contractually prescribed process proceeded to the last step which provided for advisory arbitration.[55]

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50. Sweet Home Cent. School Dist. v. Sweet Home Educ. Ass'n, 455 N.Y.S.2d 685 (N.Y. App. Div. 1979).

51. See *supra* note 32 and accompanying text.

52. Marshall County Cent. Educ. Ass'n v. Independent School Dist. No. 441, 363 N.W.2d 126 (Minn. 1985).

53. See *supra* note 44 and accompanying text.

54. See *infra* note 58 and accompanying text.

55. Hempstead Classroom Teachers Ass'n v. Board of Educ., 491 N.Y.S.2d 716 (N.Y. App. Div. 1985).

The school district rejected the arbitrator's recommendation, whereupon the union filed suit, seeking to recover damages inter alia, for breach of the collective bargaining agreement. The school district contended that the grievance procedure was the union's sole remedy. The state's intermediate appellate court found this contention to be without merit in the absence of clear language in the collective bargaining agreement which would bar the union from maintaining its action.

JUDICIAL REVIEW

Arbitration Awards and Employment Relations Board Rulings

Standard of Review. The courts continue to use the "essence" test and similar standards that generally defer to the awards of arbitrators. For example, a Pennsylvania court when asked to review an arbitration award dealing with teacher furloughs based on substantial decline in student enrollments held that the arbitrator's determination that the district's furloughing policy, printed on the back of the collective bargaining agreement, was to be considered part of the agreement, drew its essence from the agreement and, therefore, was not subject to judicial review.[56] This intermediate court referred to the following language from the state's highest court:

> To state the matter more precisely, where the task of an arbitrator . . . has been to determine the intention of the contracting parties as evidenced by their collective bargaining agreement and the circumstances surrounding its execution, then the arbitrator's award is based on a resolution of a question of fact and is to be respected by the judiciary if the interpretation can in any rational way be derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention . . . .[57]

Similarly, a Connecticut court concluded that a mere claim of inconsistency between a collective bargaining agreement and an arbitration award will not trigger judicial examination of the merits of an arbitration award.[58] Rather, the court would review the award only to

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56. Wyoming Valley W. Educ. Ass'n v. Wyoming Valley W. School Dist., 500 A.2d 907 (Pa. Commw. Ct. 1985).

57. Leechburg Area School Dist. v. Dale, 424 A.2d 1309, 1312 (Pa. 1981).

58. Board of Educ. v. Local 818 AFSCME, 502 A.2d 426 (Conn. App. 1985).

determine whether it draws its essence from the collective bargaining agreement.

The standard for review of grievance settlements, as compared to arbitration awards, is another matter. This issue arose in a case of first impression in New Jersey.[59] In an earlier case that arose under the National Labor Relations Act (NLRA), the United States Supreme Court in *General Drivers, Warehousemen & Helpers v. Riss & Co.*[60] had rejected the argument that only arbitration awards, and not grievance settlements, were binding upon the parties and judicially enforceable.

In an unbroken line of subsequent private sector cases, the lower federal courts have held that grievance settlements are entitled to the same degree of judicial deference customarily accorded arbitration awards.[61] The Supreme Court and lower federal courts recognize that the policy of the NLRA is to favor final adjustment of disputes by whatever means the parties choose. Importing this precedent into its public sector statutory scheme, the New Jersey's intermediate appellate court held that the scope of judicial review of a grievance settlement decision is limited to determining whether the interpretation of the contractual language is reasonably debatable.

The standard for judicial review of public employee labor board decisions varies according to the state and the circumstance. For example, in a decision summarized in a previous section,[62] a Michigan appeals court held that a claim of breach of duty of fair representation was within the exclusive jurisdiction of the state's Employment Relations Commission. In the court's view, the fact that the unfair labor charge involves an underlying breach of contract claim provides no reason to abandon this exclusive-jurisdiction principle. On the other hand, in another Michigan case, the Employment Relations Commission had ruled that involvement in union activities was the reason that a bus driver was dismissed, thus violating the public sector collective bargaining statute in that state. Using a substantial evidence standard, the state court of appeals reversed the commission decision, finding insufficient proof in the record that the school district knew of the bus driver's union activities prior to dismissing her.[63] The asump-

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59. Stigliano v. St. Rose High School, 487 A.2d 1260 (N.J. Super. Ct. App. Div. 1985).

60. 372 U.S. 517 (1963).

61. *See, e.g.*, United Mine Workers v. Barnes & Tucker Co., 561 F.2d 1093 (3d Cir. 1977).

62. See *supra* note 24 and accompanying text.

63. Byrnes v. Mecosta-Osceola Intermediate School Dist., 367 N.W.2d 831 (Mich. Ct. App. 1985).

tion that everyone must have known about it was not sufficient evidence. In partial contrast, in Washington a claim of breach of a collective bargaining agreement that the Public Employment Relations Commission failed to mediate did not prohibit or preclude judicial review of contractual rights.[64] The intermediate appellate court cited precedent for four tests to determine whether an administrative agency functions in a judicial capacity or in an administrative capacity: (1) whether the court could have been charged in the first instance with the responsibility of making the decision; (2) whether the function of the agency is one that courts historically have performed; (3) whether the agency performs judicial functions of inquiry, investigation, declaration, and enforcement of liabilities as they stand on present or past facts and under existing laws; and (4) whether the agency's action is comparable to the ordinary business of courts. Applying these tests, the court concluded that the resolution of factual and legal disputes arising pursuant to a collective bargaining contract is clearly a judicial function and, therefore, the review is *de novo*.

Propriety of Awards. In addition to the court decisions summarized under Standard of Review, several other cases fill out a varigated judicial picture of the propriety of arbitration awards.

In a Pennsylvania case that has since been limited by a statute which requires a choice of forum, a state court upheld an arbitrator's award in a teacher termination case, notwithstanding the arguable preemption coverage of the state's tenure legislation, which provides for a hearing before the state's secretary of education.[65] The aforementioned[66] deferential "essence" standard contributed to the court's conclusion.

In two New York cases, the propriety of arbitration awards involving work load of an athletic director and disciplinary action taken against a teacher were reviewed, respectively. In the athletic director's case, the arbitrator used a sophisticated mathematical formula to award the teachers' association a sum of one-third of the athletic director's salary for one and one-half years.[67] The state intermediate appellate court upheld the award as properly within the arbitrator's power. In the other New York case, an intermediate appellate court regarded it not to be against public policy to permit the arbitrator to review an

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64. Yaw v. Walla Walla School Dist., 696 P.2d 1250 (Wash. Ct. App. 1985).

65. Wilson Area Educ. Ass'n v. Wilson Area School Dist., 494 A.2d 506 (Pa. Commw. Ct. 1985).

66. See *supra* note 57.

67. Merrins v. Honeoye Teachers' Ass'n, 485 N.Y.S.2d 894 (N.Y. App. Div. 1985).

act of disciplining a teacher while a disciplinary hearing was being conducted at the same time, even if the arbitration resulted in a determination contrary to that reached in the disciplinary hearing.[68]

Pennsylvania's courts upheld arbitration awards concerning hiring and furloughs. In the first case, a state court upheld an arbitrator's determination that (1) a full-time substitute teacher, although not referenced in the recognition clause of the collective bargaining agreement, was nevertheless entitled to pursue the grievance procedure available to members of the bargaining unit when she was paid in accordance with the same salary schedule and over the same time, performed the same work under the same conditions at the same location, worked the same hours, and received the same employment benefits as other professional employees; and (2) a provision of the bargaining agreement requiring the school district to select a bargaining unit member over a nonbargaining unit member was violated when the school district without expressing a reason hired a teacher with no prior teaching experience over the grievant, who was a full-time substitute teacher with experience. The arbitrator's award, directing the school district to offer the substitute teacher the first available part-time or full-time regular teaching position for which she was certified, was deemed proper.[69] In the other Pennsylvania case, the court upheld an arbitrator's determination that transfer of bargaining unit work and subsequent furloughs of employees of the state school and hospitals violated the collective bargaining agreement between the union and the Department of Welfare. The court concluded that the award drew its essence from the agreement where, although the agreement contained no specific prohibition against contracting out the bargaining unit's work, its recognition clause together with its salary and seniority sections provided job protection.[70]

Similarly, a Maryland appellate court upheld an arbitration award that determined that a school board violated the collective bargaining agreement by paying its driver education teachers, who were organized into a supposedly separate school, lower pay rates than the salary schedule.[71] The board had created this "separate educational component" after the state legislature made the driver education pro-

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68. Board of Educ. v. Auburn Teachers Ass'n, 496 N.Y.S.2d 132 (N.Y. App. Div. 1985).

69. Wayne Highlands Educ. Ass'n v. Wayne Highlands School Dist., 498 A.2d 1375 (Pa. Commw. Ct. 1985).

70. Commonwealth v. State Schools and Hosp. Fed'n of Teachers, Local 1830, 488 A.2d 404 (Pa. Commw. Ct. 1985).

71. Prince George's County Educ. Ass'n v. Board of Educ. of Prince George's County, 486 A.2d 228 (Md. Ct. Spec. App. 1985).

gram optional. Finding that the driver education school utilized the board's materials, classrooms, and laboratories; that the board's insurance covered employees of the driver education school; that the board hired and paid the coordinator and teachers; and that the board retained financial control, the arbitrator determined that the driver education school was not a separate entity from the board. The court upheld the arbitrator's determination.

In Illinois, the intermediate appellate court upheld an arbitrator's determination that a local school board breached its contract with its aides by reducing their hours per day by one. The court found that the issue must be resolved by the language of the agreement, which here was clearly dispositive, rather than by the board's perceived financial crisis, which may be imaginary or real.[72]

In one of the few 1985 decisions that vacated or reversed an arbitrator's award,[73] a Michigan appeals court held that (1) the arbitrator exceeded his authority in ordering a remedy in the absence of a grievance, since the contract did not authorize the filing of prospective claims; (2) the formula used by the school district to determine the size of the work force was not a proper subject for arbitration under the agreement; and (3) the court did not exceed the limited scope of judicial review afforded to labor arbitration disputes.[74] In Ohio after a school district refused to implement an award dealing with the placement of three nurses on a degree salary schedule, a trial court of that state ordered all nurses, including nondegree nurses, to be placed on the degree schedule. The Supreme Court of Ohio upheld the award as not modified but rather confirmed, even though the nondegree nurses were not included in the original arbitration award.[75]

Statute-based Claims

Interpretation of Collective Bargaining Legislation. In Iowa, the state education association asked the court to review the validity of a declaratory ruling by the state's Public Employment Relations Board concerning the applicability of the impasse procedures of the Public Employment Relations Act to certain hypothetical situations which might be presented to fact finders or interest arbitrators under

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72. Bogguess v. Board of Educ. of Rock Island School Dist. No. 41, 479 N.E.2d 1100 (Ill. App. Ct. 1985).

73. For others see *supra* "Presumption of Arbitrability" section.

74. Lansing School Dist. v. Lansing Schools Educ. Ass'n, 370 N.W.2d 11 (Mich. Ct. App. 1985).

75. Warren Educ. Ass'n v. Warren City Bd. of Educ., 480 N.E. 2d 456 (Ohio 1985).

the act. The court answered the hypothetical questions as follows:

> (1) The fact finder may not recommend that there be no contractual provision on an unresolved mandatory topic for negotiations for which both parties had stated a position.
>
> (2) The arbitrator may do so only if it is a possible resolution of the dispute, and not if it is left unaddressed or unsettled.[76]

In Connecticut, the state association of boards of education and some local governmental units filed suit seeking declaratory judgment concerning the constitutionality of the state's final-offer interest arbitration statute for teacher-based bargaining impasses. The state's supreme court ruled that they lacked standing to challenge the statute where they had not alleged any injury to themselves nor had they sufficiently alleged that their members had any legally protected interest that the statute had invaded.[77]

The New Jersey Supreme Court upheld the statutory right of local boards of education to lay off teachers whenever "advisable because of reduction in the number of pupils."[78] The court found this statutory right to preempt the teachers' statute-based tenure and collective bargaining rights. However, the court concluded that the teachers' interest in procedurally fair notice of layoff could be balanced, through arbitration, with the employer's interest in fiscal management. A lower court had awarded a full-year's pay and benefits to the teacher because of untimely notice, but the high court modified the award to cover just the time of late notice, which was sixty-one days.

Interrelationship with Other Laws. The Supreme Court of New Jersey held that the statutory provision granting tenure to all New Jersey public school janitors, unless appointed for fixed terms, applied to custodial employees despite the district's practice of always giving them annual appointments fixed at twelve months.[79] The court concluded that the mere existence of a statute or regulation relating to a given term or condition of employment does not automatically preclude negotiations on the subject. When statute or regulation mandates a minimum level of right to benefits for public employees, but does not bar public employers from choosing to afford them greater

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76. Iowa State Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 793 (Iowa 1985).

77. Connecticut Ass'n of Boards of Educ. v. Shedd, 499 A.2d 797 (Conn. 1985).

78. Old Bridge Bd. of Educ. v. Old Bridge Educ. Ass'n, 489 A.2d 159 (N.J. 1985).

79. Wright v. Board of Educ., 491 A.2d 644 (N.J. 1985).

protection, proposals by employees to obtain greater protection in a negotiated agreement are mandatorily negotiable and contractual provisions affording employees rights or benefits in excess of that required by statute or regulation are valid and enforceable. In another statutory relationship case, a lower New Jersey court held that construction of an employment contract adopted by a high school faculty counsel and director as providing separate procedures for dismissal of teachers and the decision not to renew employment contracts was fair and reasonable since it granted more rights than state statute required.[80]

The issue in two Pennsylvania cases dealt with teacher dismissal. In one case, already mentioned,[81] the teacher had not elected to pursue the statutory remedy of a hearing for termination of tenure; the court thereby ruled that he was not precluded from seeking grievance arbitration under a collective bargaining agreement of the same issue. The teacher could choose to follow this latter path since a provision in the collective bargaining agreement between the school district and the education association encompassed the issue of employee dismissal within the term "job security." A subsequently enacted Pennsylvania statute required tenured teachers to either resort to the previous precedent or to utilize the statutory hearing procedure. An intervening dismissal was undertaken within this time period during which the new law was retroactive. The teacher tried to get "two bites of the apple" by asking for both a tenure hearing and arbitration. The court upheld the decision that the arbitration choice was sufficient, leaving the teacher without the right to have a tenure hearing.[82]

A Massachusetts appellate court held that a teacher who had been released from his job due to external constraints and who otherwise met criteria for eligibility for superannuation benefits did not lose entitlement to benefits on the grounds that, because of the recall provision of the collective bargaining agreement, employment would not be deemed to have ended until the conclusion of the "involuntary leave of absence."[83] This case exemplifies a well-understood principle —" that mere characterization of a feature of a collective bargain . . . will not save the provision if in substance it defeats a declared legislative purpose."[84]

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80. See *supra* note 59 and accompanying text.
81. See *supra* note 65 and accompanying text.
82. Scotchlas v. Board of School Directors, 496 A.2d 916 (Pa. Commw. Ct. 1985).
83. Martell v. Teacher's Retirement Bd., 479 N.E.2d 191 (Mass. App. Ct. 1985).
84. Watertown Firefighters Local 1347 v. Watertown, 383 N.E.2d 251 (Mass. 1984).

On a claim that a school custodian's discharge was an unfair practice in New Hampshire, the state's highest court held that the plaintiff-union carried a burden of proof to show that retaliation for labor activities was at least a minimal degree of motivation for discharge.[85] In Connecticut, a conflict between the state's collective bargaining and teacher tenure statutes arose over cross-unit furlough procedures. The state's intermediate appellate court decided that any layoff procedure provision in a teacher-unit collective bargaining agreement that violates the requirement that all criteria determining bargaining rights of displaced administrators *vis-à-vis* teacher unit members must also be capable of application to teacher unit members and must in fact be applicable to teacher unit members is void and unenforceable.[86] In other words, it would be an illegal subject of bargaining since it conflicts with the state tenure statute.

Finally, in a previously cited case,[87] an appellate court in Oregon found no conflict between the provisions of the fair dismissal law and the arbitration provisions in a school district bargaining agreement. That state's courts have held consistently that there is no conflict between the statutory responsibilities of a school district over renewal of a probationary teacher's contract and provisions in the district's collective bargaining agreement for the arbitration of renewal-related matters, including evaluations.

IMPASSE AND DISPUTE RESOLUTION

Fact Finding and Arbitration

Very little litigation concerning fact finding has been reported in recent years. Perhaps the gravity of litigation is gradually adding to the tendency of mediators to not request fact finding for fear it reflects on their abilities to solve the issues.

In a case that clarified a Pennsylvania statute, the court confirmed that appointment of a fact finding panel, if agreement is not reached within twenty days after mediation has commenced, is not required. The court went on to define the twenty days of mediation to be twenty calendar days after the mediator has actually been present and some mediation has occurred.[88]

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85. *In re* White Mountains Educ. Ass'n, 486 A.2d 283 (N.H. 1984).

86. Connecticut Educ. Ass'n v. State Bd. of Labor Relations, 498 A.2d 102 (Conn. Ct. App. 1985).

87. See *supra* note 43 and accompanying text.

88. Peters Township School Dist. v. Peters Township Federation of Teachers, 501 A.2d 327 (Pa. Commw. Ct. 1985).

Rights arbitration was summarized in the previous section of this chapter. The other interest arbitration decisions also were described earlier.[89]

Rights on Expiration of Contracts

Questions arising during the hiatus period of the expiration of a contract and the signing of a new contract are still being asked of the courts. The school district is usually required to maintain the status quo during this hiatus period, and any change negatively or positively may be challenged by the unions.

In Montana, for example, a school district refused to pay step salaries under an expired collective bargaining contract pending agreement of a new contract. All teachers remained on the same step as the previous year. The union maintained that the failure to advance teachers on the salary schedule that was contained in the expired collective bargaining agreement constituted a unilateral change in wages. The court evaded the issue by declaring that since a new contract with retroactive pay provisions had been signed, the issue was moot.[90] A similar question arose in New York after a school board froze each teacher's salary during negotiations of a new contract at the amount being paid at the time the previous contract expired. The state's intermediate appellate court held that the salary schedule contained in the expired contract was one of the terms of that contract which was required to be extended during negotiations. Therefore, each teacher was to be paid during the negotiation period pursuant to the schedule according to that teacher's longevity and educational qualification status as it existed at the beginning of the new pay period.[91] The appeal was denied.[92]

In Pennsylvania, a school district during the extension of the terms of an expired collective bargaining agreement changed insurance carriers. Unemployment compensation claims were filed after the board's action, since the employees walked out after the change of carrier. The court held that the school district engaged in a lockout by its alteration of insurance carrier during the negotiating period following expiration of the old collective bargaining agreement and that,

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89. See *supra* notes 76-77 and accompanying text.

90. School Dist. No. 4 v. Board of Personnel Appeals, 692 P.2d 1261 (Mont. 1985).

91. Cobleskill Cent. School Dist. v. Newman, 481 N.Y.S.2d 795 (N.Y. App. Div. 1984).

92. Cobleskill Cent. School Dist. v. Newman, 489 N.Y.S.2d 903 (N.Y. 1985).

therefore, the teachers were entitled to unemployment compensation.[93]

CONCERTED ACTIVITY

Strikes and Other Job Actions

In Pennsylvania there exists under statute a limited right to strike. It is, consequently, not surprising that Pennsylvania had three strike-related court decisions during 1985. In one district, the teachers struck and the board attempted to have the court order the teachers back to work. The issue was whether the impasse procedures had been exhausted, which is a prerequisite for a legal strike under the statute. In the aforementioned decision,[94] the court ruled that when the mediator became physically present for mediation, the twenty day period for mediation began and ran for the next twenty calendar days. Thus, since the twenty days of mediation did not mean twenty mediation sessions, the union's strike was legal.

The second case in Pennsylvania dealt with the rescheduling of work days after a strike had ended. The state's collective bargaining law disentitles public employees from pay for the period engaged in a strike. Nevertheless, the court found that an arbitrator's award of eight days' additional pay to teachers was proper since the school year was rescheduled to consist of 172 instructional days, and the award was concerned with the failure to provide for 180 days of public instruction as required by agreement and state statute, rather than with pay for the period during which the association was on strike.[95]

In the third Pennsylvania case, the question of when a work stoppage is a strike or a lockout was addressed. In this instance, the school district changed its insurance carrier while an extension of a contract was in existence. As stated above,[96] the court found that the school district had engaged in a lockout by its alteration of insurance carrier during the negotiations period. The "status quo" thereby had been breached by the school district.

Other reported decisions arose under state statutes that prohibit teacher strikes. In a previously described case,[97] Rhode Island's Su-

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93. Grandinetti v. Commonwealth Unemployment Compensation Bd. of Review, 486 A.2d 1040 (Pa. Commw. Ct. 1985).

94. See *supra* note 88 and accompanying text.

95. Upper Bucks County Area Vocational-Technical School Joint Comm. v. Upper Bucks County Vocational-Technical Educ. Ass'n, 497 A.2d 943 (Pa. Commw. Ct. 1985).

96. See *supra* note 93 and accompanying text.

97. See *supra* note 25 and accompanying text.

preme Court determined that a strike by a teachers' association in response to the school committee's reduction of the salary scale was illegal. In rejecting the teacher association's argument that the no-strike prohibition unfairly discriminated against public employees, the court waxed eloquent:

> The state has a compelling interest that one of its most precious assets—its youth—have the opportunity to drink at the fountain of knowledge so that they may be nurtured and develop into the responsible citizen of tomorrow. No one has the right to turn off the fountain's spigot and keep it in a closed position. Likewise, the equal protection afforded by the fourteenth amendment does not guarantee perfect equality. There is a difference between a private employee and a public employee, such as a teacher who plays such an important part in enabling the state to discharge its constitutional responsibility. The need of preventing governmental paralysis justifies the "no strike" distinction we have drawn between the public employee and his counterpart who works for the private sector within our labor force.[98]

Based on a Massachusetts law prohibiting strikes by teachers, when a school superintendent learned from reliable sources that the union planned a job action involving a "sick out," he wrote the following to the union's president: (1) that he would ask the Massachusetts Labor Relations Commission for an investigation of any work stoppage; (2) that he would require a physician's statement from any employee absent from school; (3) that he would pay no compensation "for any day missed, in appropriate cases"; and (4) that he would take other appropriate disciplinary action. When ninety-five of the 400 classroom teachers called in sick, the Labor Relations Commission supported the requiring of physicians' excuses. The court affirmed the decision.[99]

In another previously mentioned case,[100] a California court held that a job action of picketing and leafleting outside the private business offices of two members of the school board did not constitute an unlawful economic boycott or a corrupt practice, nor did it unlawfully create conflict on the part of the board members between private business interest and public duty. Therefore, the court concluded, an in-

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98. School Comm. of Westerly v. Westerly Teachers Ass'n, 299 A.2d 441 (R.I. 1973).

99. See *infra* note 108 and accompanying test.

100. See *supra* note 9 and accompanying text.

junction against such picketing and leafleting violated the employee's first amendment rights.

MISCELLANEOUS DECISIONS

Most of the cases reviewed in this chapter have parts that could be considered miscellaneous. However, each case has been reviewed in terms of its major potential impact(s) on the collective bargaining process. One case in New York presented an issue that did not seem to have a major impact in the previous sections of this chapter. Grievance arbitration was conducted pursuant to the grievance procedure contained in a collective bargaining agreement between the parties. The school district then petitioned to vacate the arbitration award on the grounds that the arbitrator was not impartial because he failed to disclose that he was employed by the New York State United Teachers. The appellate court ruled against vacating the award finding that the arbitrator's biographical data card which was submitted to both parties prior to the selection of the arbitrator was sufficiently informative.[101]

The question a New Jersey court was asked to answer was whether a multi-tiered salary schedule of a collective bargaining agreement that results in the payment of a lesser salary to older employees is in violation of that state's age discrimination statutes.[102] In sex discrimination cases based on New Jersey's legislation, the test for a *prima facie* showing is the same as used in federal cases arising under title VII of the Civil Rights Act of 1964.[103] Because the provisions of the Age Discrimination in Employment Act (ADEA) were modeled after title VII, those standards apply to ADEA cases.[104] Under title VII, the United States Supreme Court has recognized two separate theories of relief: disparate treatment and disparate impact. The court cited precedent which expressed disparate treatment as follows:

> The employer treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

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101. Canajoharie Cent. School Dist. v. Canajoharie United School Employees, 485 N.Y.S.2d 866 (N.Y. App. Div. 1985).

102. Giammario v. Trenton Bd. of Educ., 497 A.2d 199 (N.J. Super. Ct. App. Div. 1985).

103. Peper v. Princeton Univ. Bd. of Trustees, 389 A.2d 456 (N.J. 1978).

104. Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979).

In contrast, claims of disparate impact address employment practices that are facially neutral but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive is not required under disparate impact theory.[105]

In this New Jersey case, the lack of discriminatory motive had been stipulated; consequently, only disparate impact was at issue. The state's highest court reasoned that although monetary consideration cannot normally justify policies which by way of impact discriminate on the basis of age, the rule must be different with respect to labor negotiations, an exercise in which fiscal effect is a primary factor. Compromises will often be in the area of retroactivity which will by definition relate to seniority, a quality with a high correlation to age. Regarding the provision of new benefits on a prospective-only basis as being a rational and usual compromise, the court ruled that in the absence of intentional discrimination, a facially neutral provision in a labor contract that impacts adversely on an older age group in an incidental manner does not violate the ADEA.

In a decision by a Florida intermediate appellate court, it was ruled that the Master Teacher Program, which confers a grant/award on selected superior teachers, is not in violation of the state's collective bargaining law.[106] The court concluded that this payment is not "wages" as defined by the collective bargaining law inasmuch as the legislature, not the employer-school district, was making the award.

The issue of whether parental leave should be awarded to a pregnant school teacher revealed a conflict between a school board decision and the statutory jurisdiction of the Public Employee Labor Relations Board in New Hampshire.[107] The local board ruled against the leave request, but the labor relations board ruled in favor of the request even though the grievance procedure had no provision for arbitration or appeal. The court had no problem in allowing the decision of the labor relations board to stand. The court found that absent a provision for binding arbitration in the grievance procedure and absent language in the contract indicating that the decision in the grievance procedure is final, the state labor relations board has jurisdiction as a matter of law to interpret the contract.

Similarly deferring to the appellate state agency, a Massachusetts appeals court upheld the determination of the state's labor relations

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105. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

106. United Teachers of Dade FEA/United, AFT Local 1974 v. Dade County School Bd., 472 So. 2d 1269 (Fla. Dist. Ct. App. 1985).

107. *In re* Hooksett School Dist., 489 A.2d 146 (N.H. 1985).

commission that a school committee had acted reasonably when it required a physician's certificate from absentee teachers who had been informed three months earlier that the physician's excuse might be required if a "sick out" occurred.[108]

CONCLUSION

It is once again obvious that the end of litigation concerning educational collective bargaining issues is no where in sight. Collective bargaining is a dynamic, fluid, and constantly changing process. New questions arise. The multilevel appellate process, the variety and fluidity of state statutes, and the shifting boundaries with arbitrators, labor boards, and the federal sources of labor law also contribute to the unending stream of litigation for this chapter. It would certainly appear that the only way litigation concerning the bargaining process in education can be limited is for both sides to talk about the issues more frequently, sympathetically, and effectively. Compromise at the parties' level is preferable to court imposed "solutions," which rarely seem satisfying and noncompounding. The local level is the primary place to make and solve labor relations problems.

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108. School Comm. of Leominster v. Labor Relations Comm'n, 486 N.E.2d 756 (Mass. App. Ct. 1985).

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PUPILS

Henry S. Lufler, Jr.

Introduction / 69
Public School Assignment, Tuition, and Transportation / 70
- Tuition and Assignment / 70
- Transportation / 74
- Compulsory Attendance / 75

Bilingual-Bicultural Programs / 82
Private and Parochial Schools / 83
School Sports / 86
- State Athletic and Activity Associations / 86
- Discrimination and School Sports / 89

Substantive Rights of Students / 90
- Search and Seizure / 90
- First Amendment Religious Rights / 94
- First Amendment Freedom of Expression / 101

Sanctions for Student Misconduct / 105
- Suspensions and Expulsions / 105
- Corporal Punishment / 109

Testing and Placement / 109
Desegregation / 111
- Systemwide Remedies / 112
- Cross-district Remedies / 112
- Desegregation Plan Oversight / 115
- Attorney Fees / 119

INTRODUCTION

First amendment religion cases assumed increasing importance in 1985. The United States Supreme Court decided two cases regarding the offering of publicly funded programs in private schools and addressed the question of a moment of silence at the start of the school day. Courts also wrestled with the question of the use of school facilities, both by religious groups and those conveying a political message. In addition, a large number of cases addressed claims that parents have the right to educate their children at home, either for religious

reasons or based on other arguments. As a consequence, the compulsory attendance section of this chapter grew significantly.

The Supreme Court, as well as a number of state courts, heard cases in 1985 involving school searches. The grounds under which such searches might be conducted were argued, with courts continuing to find that most school searches did not violate the fourth amendment. A new balancing test for weighing the legality of searches was set forth by the Supreme Court.

Finally, school desegregation cases continued the trend seen in recent years by focusing on claims that districts had achieved unitary status. Court supervision is removed once a district has attained an order holding that desegregation has been achieved. This gives the district greater latitude to manage internal affairs and requires a new showing of discriminatory intent if court review of decisions affecting minority students is to be secured. A major issue involving the point in time from which attorney fees can be charged in desegregation cases also was addressed in several jurisdictions.

PUBLIC SCHOOL ASSIGNMENT, TUITION, AND TRANSPORTATION

Tuition and Assignment

Pupil assignment cases range from those involving the exclusion of whole groups of children from the public schools to those minor disputes in which a child lives in a home astride a district line. The United States Supreme Court has, in recent years, addressed a number of constitutional issues associated with residency requirements. The Court has affirmed the rights of states and school districts to have such requirements and to prohibit parents from sending their children to schools outside their own geographic districts under *de facto* guardianships.[1] At the same time, residence requirements cannot exclude classes of children otherwise residing in the district, such as undocumented aliens.[2] Residence statutes also cannot create an irrebuttable presumption of nonresidence, thereby affording an individual no opportunity to prove domicile for the purpose of receiving educational benefits.[3]

A number of these constitutional issues were found in a 1985

1. Martinez v. Bynum, 461 U.S. 321 (1983).
2. Plyler v. Doe, 457 U.S. 202 (1982).
3. Vlandis v. Kline, 412 U.S. 441 (1973).

Eighth Circuit case.[4] The plaintiffs in the case were minors who did not have a parent or legal guardian living in the school district that had excluded them. The two children were living with an aunt and an uncle; their natural father was, according to the proceedings, an unfit parent and the mother, while not wishing to have the children with her, refused to consent to a transfer of legal guardianship. The district court had held that the school district's action comported with Arkansas statutes requiring either a parent or guardian to live in the district.[5]

In confronting this set of facts, the Eighth Circuit Court concluded that the district's action had created a class of children who were in the district for reasons other than to obtain an education who did not meet the residency requirement. The court could not find a substantial state interest for the district's discrimination against this class, thereby holding that it violated the equal protection clause. The court also found that the *Vlandis v. Kline* requirement against irrebuttable presumptions had been violated because there was no way the plaintiffs could demonstrate they resided in the district for educational purposes. Therefore, the due process clause also had been violated.

The appeals court ordered the children admitted to school, suggesting that school districts address residency questions by focusing on a student's present intent to remain in the school district. The court therefore rejected the statute's overly narrow test of focusing only on parents and guardians as a means of determining residence for educational purposes. The case was remanded for a determination of damages for the constitutional violation.

Equal protection arguments also were raised in a case challenging an Atlanta, Georgia policy of requiring tuition payments from some classes of aliens attending public schools.[6] Under the policy, never formally adopted by the board of education, children under some, but not all, visa categories were required to pay tuition. Apparently directed at children of aliens of Iranian citizenship attending Georgia universities, the policy was implemented by the district's budget manager and was later rescinded, though the district refused to return tuition payments made by the plaintiffs. The plaintiffs sought a summary judgment for the tuition refund as well as damages.

The court had little trouble in sustaining the plaintiff's request for a summary judgment on equal protection grounds. The disputed

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4. Horton v. Marshall Pub. Schools, 769 F.2d 1323 (8th Cir. 1985).
5. Horton v. Marshall Pub. Schools, 589 F. Supp. 95 (W.D. Ark. 1984).
6. Pena v. Board of Educ. of City of Atlanta, 620 F. Supp. 293 (N.D. Ga. 1985).

policy applied only to some classes of visa holders and, further, did not apply to the offspring of students from other states attending institutions of higher education in Georgia. While the defending school system sought to argue that the policy had not been adopted by the board, thereby avoiding the damage issue, the court observed that board members had been informed of the policy at a meeting and had not objected. Furthermore, the court held a district "should not be permitted to insulate itself from section 1983 liability merely by authorizing its agents to develop programs, being 'informed' of them, and then silently acquiescing in their implementation."[7] The parties were given thirty days to prepare briefs on the damage question.

A White Plains, New York student sought summary judgment on the issue of damages arising from his exclusion from school.[8] The case hinged on the failure of the district to provide written notice as to the reasons why the defendant was denied residence, even after several requests made by the plaintiff's attorney recorded after an appeal deadline had passed and the plaintiff had finally secured counsel. Following a discussion of the seriousness of the district's decision, the court concluded that the plaintiff, at that point unrepresented, would have no way of knowing that the school board's decision could be appealed to the state superintendent. Having concluded that written notice of the findings and the appeal procedures were required, the court held that the board and state superintendent were liable for "nominal" damages for the denial of the plaintiff's due process rights.

The question of estoppel was successfully raised in a case heard by the Oklahoma Supreme Court.[9] The plaintiff had purchased a home in 1975, relying on telephone calls made to two school districts that the property in question was located in the Mid-Del district. After sending their children to Mid-Del schools for five years, District 89, the adjoining district, concluded they had erred five years earlier and that the children should be attending their schools. The parents sued to keep their children in the district where they had been attending. While observing that estoppel was not normally invoked against the state, as it would preclude officials from enforcing lawful policies, the Oklahoma court allowed its use in this case, holding that the children had attained *de facto* residence in the district they had attended for five years.

Parents often dispute school district residence decisions on the

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7. *Id.* at 302.
8. Takeall v. Ambach, 609 F. Supp. 81 (S.D.N.Y. 1985).
9. Burdick v. Independent School Dist. of Okla. County, 702 P.2d 48 (Okla. 1985).

ground that a higher-quality education can be obtained for their children at their preferred school. These cases generally fail to succeed. A statute in the state of Washington, however, permits the superintendent to approve such a transfer if a "special hardship or detrimental condition" is alleviated as a result. The parents of two children failed to convince the superintendent that such an exception should be granted for their offspring and a suit commenced, finally reaching the Supreme Court of Washington.[10] The system the children were to attend had fifty students, and when the students previously were enrolled in it they had done poorly. The children had attended an adjacent district for a year and the children had, the parents argued, showed educational gains. The court refused, however, to overturn the superintendent's decision, and overrode a lower-court decision which had reversed it, holding that disparities among school districts were not, alone, enough to conclude that the children could not make educational gains in the district where they resided. To rule otherwise, the court observed, would reduce the state to a single school district.

In a decision handed down a month later, a Washington appeals court reversed the superintendent's decision in another "hardship" case.[11] In this instance, a variety of factors were related to the court's conclusion regarding the transfer. The transfer had been approved locally, but a change in local administrators led to a revocation of the permission, in spite of the fact that the student would then be obligated to travel an additional hour and a half each day on a school bus. Failure to grant the transfer, it was argued, also would affect the mother's health and would lead to other family problems. Accepting these reasons, the court overturned the superintendent's decision, holding it to be erroneous, given the facts of the case.

A New York parent also sought to change his daughter's school district, arguing that state law permitting such transfers only for handicapped, gifted, or behaviorally problematic students was arbitrary and capricious.[12] In a brief decision, an appeals court held that the district's decision was reasonable and that it was rationally related to the goal of preventing overcrowding and the maximum utilization of educational facilities.

Some states have laws permitting students to attend school tuition free if their parents move out of a district just before or during the student's senior year. An Ohio student in his junior year sought to expand this concept and finish school in the same institution by

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10. Ramsdell v. North River School Dist., 704 P2d 606 (Wash. 1985).
11. Pat v. Stanwood School Dist., 705 P2d 1236 (Wash. Ct. App. 1985).
12. Britt v. Rogers, 485 N.Y.S.2d 358 (N.Y. App. Div. 1985).

claiming that his grandfather was his legal guardian. Absent any showing of legal custody, an appeals court rejected the attempt.[13]

In an unusual case, a local district sought to continue to send some of its students to an adjoining district, over the objections of parents and a ruling by the state education department.[14] It was less expensive for the Wayne Highland School District in Pennsylvania to pay for the students to be educated across the state line in New York. The state appeals court decision, however, made it clear that assignment to another district was possible only with parental approval.

Finally, in a 1985 fee case, the Attorney General of Michigan filed suit against two school districts, alleging that their imposition of a fee for students participating in interscholastic athletics violated the state constitution.[15] Courts traditionally uphold fees for school activities that are not part of the school's academic program. In the case at hand, an appeals court rejected the state constitutional challenge, noting that participation in sports was voluntary and extracurricular in nature. The court also observed that there was a confidential process, available to students unable to pay, whereby the fee could be waived.

Transportation

The cost of transporting students living in isolated areas of large rural school districts sometimes leads to litigation to determine who is responsible for the charge, or to demands for transportation when a district refuses to provide it. In 1980, the West Virginia Supreme Court of Appeals held that the condition of a rural road could not be used by a district as grounds to refuse to provide transportation.[16] In that case, the court determined that the district would have to purchase a vehicle other than a traditional school bus in order to avoid denying the equal protection rights of the students. A case before the West Virginia high court in 1985 extended the coverage of its 1980 decision.[17] Two handicapped children who resided on a privately owned road had been denied transportation. The court ruled, however,

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13. State *ex rel.* Henry v. Board of Educ., Madison Plains Local Schools, 485 N.E.2d 732 (Ohio Ct. App. 1984).

14. Wayne Highlands School Dist. v. Pennsylvania Dep't of Educ., 488 A.2d 1172 (Pa. Commw. Ct. 1985).

15. Attorney General v. East Jackson Pub. Schools, 372 N.W.2d 638 (Mich. Ct. App. 1985).

16. Shrewsbury v. Board of Educ., 265 S.E.2d 767 (W. Va. 1985).

17. Kennedy v. Board of Educ., McDowell County, 337 S.E.2d 905 (W. Va. 1985).

that the state law did not distinguish between public and private roads and therefore the district had an obligation to provide the service. In an earlier West Virginia case, the same court ordered a school district to provide bus service to two families living beyond current bus routes and to consider reorganizing the routes to prevent rides in excess of an hour.[18]

An Arizona transportation case involved interpretation of state laws governing the responsibility for busing costs in school districts that do not operate high schools.[19] The Vail School District had no high school and paid transportation costs to send some of its students to one of several adjacent districts that operates a secondary school. Some students, however, attended a different high school located closer to their homes, under a state law that gives parents the right to select a school of their choice when they live in a district without a high school. At issue, then, was the question of whether the Vail District, once it paid transportation costs for some students, was obligated to pay the bill for all students residing within the district. The appeals court concluded that state statutes created no such obligation. The court reasoned that it would be economically impossible to pay districts to transport a single student over long distances, the "logical conclusion" of the appellant's position.

A North Dakota parent who agreed to pay for transportation under a statute authorizing a district to charge for transportation services later filed suit challenging the constitutionality of the statute. The father had paid one-third of the sum he contracted to pay. The North Dakota Supreme Court declined to hear the constitutional challenge, however, holding that a litigant cannot seek to enjoy benefits by challenging the constitutionality of the law once having entered into the contract.[20]

Compulsory Attendance

Compulsory attendance cases have grown in number in recent years as more and more parents seek to educate their children at home or in fundamentalist Christian schools. Litigation results when parents or schools fail to comply with state statutes regulating curriculum and the credentials of teachers or with definitions of what constitutes a school. At the same time, states without a statutory defini-

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18. Sigmon v. Board of Educ., Roane County, 324 S.E.2d 352 (W. Va. 1984).
19. Flowing Wells School Dist. v. Vail School Dist., 700 P2d 1378 (Ariz. Ct. App. 1985).
20. Bismarck Pub. Schools v. Walker, 370 N.W.2d 565 (N.D. 1985).

tion of a school, or with vague requirements regarding curriculum, have found themselves without an effective compulsory attendance law after court rulings that overly broad or vague statutes violated the fourteenth amendment. A number of attendance statutes fell as a result of such challenges in 1985.

In a case that the United States Supreme Court refused to review,[21] the Iowa Supreme Court ruled that the Calvary Baptist Christian Academy was required to comply with state private school reporting requirements and that the "Amish exception" to state compulsory attendance laws was not improperly denied them by the state board of public instruction.[22] The school's pastor had argued that the selection of the school's teachers "is made by God" and that the state therefore could not require state certification or licensing. Likewise, the school's curriculum was "set by God alone" and could not be reported to the state.[23]

The Iowa court rejected these arguments, observing that educational credentials and religious beliefs were not necessarily mutually exclusive. The church school officials were free to select teachers based on their religious beliefs, so long as they also were qualified as teachers. The court also held that the state can set basic educational requirements and gather data to see if they are met. On the question of the "Amish exemption," the court found the beliefs of the plaintiffs to be "greatly less interwoven with their daily mode of life" than those of the Amish and refused to sustain the plaintiff's equal protection argument that they should be treated the same. The Iowa requirement of "equivalent instruction" at private schools, a term argued in other 1985 attendance cases, was not raised in this appeal.[23]

The failure of Iowa state law to define "equivalent instruction" was, however, at issue in a federal court case.[24] In addition, as in the state case just discussed, the plaintiffs objected to reporting basic data about students, the names of teachers, and the course of study pursued by each child. The school also refused to use certified teachers. The argument that these regulations violated the religious freedom of church members was rejected by the court, which held that the state interest in guaranteeing the education of children overrode the small intrusion these requirements represented into the plaintiff's first amendment rights.

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21. Pruessner v. Benton, 54 U.S.L.W. 3401 (1985).

22. Johnson v. Charles City Community Schools Bd., 368 N.W.2d 74 (Iowa 1985).

23. *Id.* at 78.

24. Fellowship Baptist Church v. Benton, 620 F. Supp. 308 (D. Iowa 1985).

The Iowa requirement of "equivalent education," however, was struck down as being unconstitutionally vague, thereby violating the due process clause of the fourteenth amendment. The Iowa state superintendent had argued that the requirement referred to days of instruction and a list of required courses. Local school officials, on the other hand, had interpreted the term to require them to check the actual content of courses. In view of the lack of state court decisions to help interpret the legislature's intent with regard to the term, the district court held that it was overly vague. The court also held the plaintiffs responsible for the costs of the case.

Minnesota law requires teachers at private schools to have qualifications "essentially equivalent" to those of public school teachers offering the same subjects or teaching the same grades. The mother of two children formed the "Newstrom Family School" to educate her children at home and subsequently was convicted of violating Minnesota's compulsory attendance statute. The state argued that the mother's two years of college training was not equivalent, under the statute, while the parent had sought unsuccessfully to have evidence regarding her teaching skills and her children's performance considered by a lower court.

In considering the case, the Minnesota high court observed that trial judges in the state had difficulty in interpreting the statutory language and that it had been read differently in varying locations.[25] The court therefore concluded, after a discussion that spoke approvingly of standards for private-school students, that the language was too vague to form the basis for a criminal truancy prosecution. The court went on to suggest, however, that a civil proceeding initiated by a local school superintendent would place the burden on a private school to prove that the instructor had qualifications that were "essentially equivalent." In a companion case, the Minnesota court also affirmed a lower-court reversal of an attendance-law conviction, for the same reasons as in the previous case.[26]

Two Missouri families established an organization known as Families for Home Education and sought to educate their children at home to avoid exposing them to values in the public schools which they felt violated their personal religious convictions. They challenged the Missouri compulsory attendance statute which requires that home instruction "shall, in the judgment of a court of competent jurisdiction, be at least substantially equivalent to the instruction given children in the day schools in the locality in which the child resides."[27]

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25. State v. Newstrom, 371 N.W.2d 525 (Minn. 1985).
26. State v. Budke, 371 N.W.2d 533 (Minn. 1985).
27. Mo. Rev. Stat. § 167.031 (1978).

The plaintiffs argued that the term "substantially equivalent" rendered that portion of the statute unconstitutional because it violated their substantive due process rights. A district court agreed, finding that neither the state education department nor state courts had ever attempted to define its meaning.[28] The court stayed its order until May 1986, in order to allow the legislature to reword the home instruction portion of the statute. Failure to act would leave the state without a provision for home instruction, causing parents of children educated at home to be subjected to truancy charges.

A Massachusetts district court rendered a decision on a number of motions related to a case involving two Christian academies.[29] As is often the case in attendance disputes, this controversy began with a squabble between public and private school administrators. In this instance, the public school administrator eventually sought to approve the private school curriculum. While dismissing some of the motions and accepting others, the court refused to render a summary judgment that the state statute requiring private school instruction to be equal "in thoroughness and efficiency" to that of the public schools was overly broad. The case will now be argued on the remaining issues.

The question of home instruction in North Carolina has been litigated on several occasions, but, in the absence of a home instruction provision in the state statutes, courts have been reluctant to permit home instruction under "private school" definitions.[30] The issue again was considered by the Supreme Court of North Carolina in a case involving the "Hallelujah School" which parents had started to educate their two children at home.[31] The parents espoused a series of social and religious views, including their belief that sending children to school at an early age signifies to the children their parents' rejection of them. A state official refused to certify the school, and litigation commenced.

The North Carolina court concluded that the school had complied with private school statutory regulations: the maintenance of student records, health and safety inspections, administration of standardized tests, and the provision of other information to state officials. The court concluded, therefore, that home instruction meeting these requirements met the legislative intent regarding what constituted a

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28. Ellis v. O'Hara, 612 F. Supp. 379 (E.D. Mo. 1985).

29. Braintree Baptist Temple v. Holbrook Pub. Schools, 616 F. Supp 81 (D. Mass. 1985).

30. Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983); Delconte v. State, 308 S.E.2d 898 (N.C. Ct. App. 1983). *See* The Yearbook of School Law 1984 at 140.

31. Delconte v. State, 329 S.E.2d 636 (N.C. 1985).

school. The fact that the state had recently eliminated private school requirements with respect to curriculum and teacher credentials was cited by the court as evidence that the state was loosening standards regarding nonpublic education in North Carolina. The North Carolina legislature was invited, if it wished, to address further the question of home instruction through changes in the law.

Florida statutes define a school as "an organization of pupils for instructional purposes on an elementary, secondary, or other public school level . . . ."[32] Parents who were educating their children at home had sought to claim their residence as a private school, in part to avoid the home instruction Florida statute which permits such instruction only by a "private tutor" meeting certain requirements. A Florida appeals court, however, refused to find that the state school definition was unconstitutionally vague, and upheld the parents' conviction for violating compulsory attendance laws.[33] A lengthy dissent filed by one judge argued that the definition was overly vague, citing a number of the cases already reviewed in this section to support his contention.

Protracted litigation involving Indiana's compulsory schooling law continued in 1985. A federal district court had stayed proceedings in the case, three years after it had first been filed, inviting the plaintiffs to bring the case in state court. The plaintiffs appealed the stay, and the Seventh Circuit Court of Appeals first ruled that a stay order was appealable.[34] On the actual appeal, the circuit court offered the opinion in *dicta* that the "equivalent instruction" requirement in Indiana law was not overly vague and remanded the case to the district court to rule on the numerous issues in the case, holding that further delay was not warranted.[35] The district court refused to decide the constitutionality of the state statute, concluding instead that the plaintiff's testimony had proved that their children had received equivalent instruction in their home program.[36] The plaintiffs in the case also asked for damages and injunctive relief, claiming they had been harassed by various state and local officials. These requests were denied.

In a case of a different sort, parents who claimed they were in

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32. Fla. Stat. § 228.041(5) (1984).

33. Florida v. Buckner, 472 So. 2d 1228 (Fla. Dist. Ct. App. 1985).

34. Mazanec v. North Judson-San Pierre School Corp., 750 F.2d 625 (7th Cir. 1984).

35. Mazanec v. North Judson-San Pierre School Corp., 763 F.2d 845 (7th Cir. 1985).

36. Mazanec v. North Judson-San Pierre School Corp., 614 F. Supp 1152 (N.D. Ind. 1985).

danger of being prosecuted under North Carolina's compulsory attendance law filed suit attacking their school district's plan to lengthen the school day and to change the school year from 180 days to 200 days.[37] The changes were being made under an experimental, state-funded program to improve student learning. The state appeals court concluded that state law did not preclude increased school days and additional instruction beyond the minimum required, finding that parents should be "blessed with the opportunity," rather than feeling burdened. The court also held that there was no evidence that parents were in danger of being prosecuted under the state's compulsory attendance law.

Compulsory attendance cases sometimes involve simultaneous state court and federal court litigation. In one such case, Texas parents charged in a state court proceeding for failing to send their children to school brought suit in federal court alleging the prosecution was in retaliation for exercising their first amendment religious rights. The state action, in the meantime, had been dismissed and a second prosecution had been started. The parents then argued that they had been told that their refusal to change their federal complaints regarding the first state prosecution would lead to their second arrest. To resolve this confusion, the Fifth Circuit Court of Appeals sustained a lower court ruling that held there was conflicting evidence on the role of the prosecutor in the decision to initiate the second case.[38] The appeals court held that the case in state court should continue and that the constitutionality of the Texas school definition should be decided there.

In another case alleging harassment, Maine officials were alleged to have conspired to deny the constitutional rights of parents seeking to educate their children at home. Following the 1983 decision by Maine's Supreme Judicial Court which held that the parents did not have such a right,[39] the parents went to federal court seeking the removal of the justices who had voted against them and other damages as well. The *pro se* complaint included the plaintiff's own lawyer in the state case, who was alleged to be a "coconspirator" with state officials. In a sharply worded decision, the federal court dismissed the complaint as having no legal foundation, holding open only that portion involving the plaintiff's former attorney, who had asked for dam-

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37. Morgan v. Polk County Board of Educ., 328 S.E.2d 320 (N.C. Ct. App. 1985).

38. Trower v. Maple, 774 F.2d 673 (5th Cir. 1985).

39. Maine v. McDonough, 468 A.2d 977 (Me. 1983). *See* The Yearbook of School Law 1985 at 95-6.

ages and fees as part of his response to the complaint.[40]

The use of contempt proceedings to force juveniles to attend school has been employed in a number of jurisdictions in recent years. Failure to attend results in incarceration in a juvenile detention facility. A Wisconsin appeals court considered a case challenging the contempt procedures used by a circuit judge.[41] A sixteen-year old girl had been found delinquent after a shoplifting incident and had three times been placed in a detention facility, following hearings, for failure to attend school. On the fourth occasion, she was ordered to the facility without a formal hearing. At issue in the appeal was whether the court could, on its own motion, order the detention. The appeals court concluded, following the precedent of *In re Gault*,[42] that juveniles are entitled to the same constitutional safeguards as adults, and that the local court was obligated to follow all the procedures contained in Wisconsin's contempt statute, including a hearing before incarceration.

A California court considered the question of whether a status offender could be held in contempt for failing to attend school.[43] The student had been assigned to forty-eight hours in a locked facility with time off to attend school. California law specifically forbids the use of locked facilities for truants. The appeals court concluded, however, that the statute had not precluded the use of juvenile contempt proceedings to accomplish the same end.

A Georgia court found a sixth-grade student "unruly" and placed the student under court supervision for missing numerous school days. The student's mother argued that the child had been legitimately absent from school, but the long pattern of absences caused the Georgia Court of Appeals to sustain the lower court's ruling.[44]

New York City began a "Truancy Patrol Program" in 1981. Minors can be arrested without warrant and returned to school. A student involved in assaulting a police officer who was attempting to return him to school subsequently argued that, because the offense was noncriminal in nature, he could not be charged with the assault of an officer in the performance of his duties.[45] Assault of an attendance officer is, under New York law, third-degree assault, while assault of a police officer is chargeable as second-degree assault. The New York City court found that the noncriminal detention of truants was, in fact, the officer's lawful duty and that the more serious charge applied.

40. McDonough v. Ney, 599 F. Supp. 679 (D. Me. 1984).
41. *In re* B.L.P., 345 N.W.2d 510 (Wis. Ct. App. 1984).
42. 387 U.S. 1 (1967).
43. *In re* Michael G., 214 Cal. Rptr. 755 (Cal. Ct. App. 1985).
44. *In re* A.D.F., 335 S.E.2d 144 (Ga. Ct. App. 1985).
45. *In re* Julio R., 492 N.Y.S.2d 912 (N.Y. Fam. Ct. 1985).

BILINGUAL-BICULTURAL PROGRAMS

An Illinois district court class action suit filed on behalf of Spanish-speaking children challenged the administration of that state's law on transitional bilingual education.[46] The statute requires school districts to identify children of limited English-speaking ability and, if they number more than twenty, to provide a bilingual education program. The suit sought a mandatory injunction requiring the state board to develop regulations for the program, to be followed by local districts, and requiring the districts to provide the services. The plaintiffs charged that the failure of the state to act violated their federal rights under the Equal Educational Opportunities Act of 1974 (EEOA), title VI of the Civil Rights Act of 1964, and the fourteenth amendment.

The defendants in the case responded by asserting that the eleventh amendment barred a federal suit against the state, following the Supreme Court's holding in *Pennhurst State School and Hospital v. Halderman*.[47] In *Pennhurst*, the Court concluded that federal suits against state officials were possible only if the suit challenged the constitutionality of a state statute or of a state official's action. The plaintiffs countered by arguing that *Pennhurst* did not apply because the defendants' failure to implement the state law also was a violation of federal law. The district court, however, rejected this argument and held that the eleventh amendment did apply. Therefore, the plaintiff's federal complaint requesting relief for state law violations was dismissed.

The district court also concluded that the EEOA required only that states set up a program for bilingual education, leaving it to local school districts to implement the plan. Contrary to the plaintiff's assertions, the district court found that Illinois had developed such a plan. The court also rejected the title VI and fourteenth amendment arguments made by the plaintiff, holding that intentional discrimination must be proved before defendants could prevail.[48] The plaintiffs had not alleged purposeful discrimination nor past *de jure* discrimination. While dismissing all parts of the complaint, the plaintiffs were directed to file their complaint against local school districts for failing to provide the program as required by state law.

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46. Gomez v. Illinois Bd. of Educ., 614 F. Supp. 342 (N.D. Ill. 1985).

47. 465 U.S. 89 (1984).

48. *See* University of Cal. Regents v. Bakke, 438 U.S. 265 (1978), modifying Lau v. Nichols, 414 U.S. 563 (1974); Washington v. Davis, 426 U.S. 229 (1976) and subsequent Supreme Court desegregation cases.

PRIVATE AND PAROCHIAL SCHOOLS

Cases involving the transportation of private school students continued to be heard in 1985. Constitutional challenges to state laws providing transportation to private school students have been resolved in favor of the service, holding that the safety of pupils outweighs any indirect benefit to the schools themselves. Litigation in this area has therefore reached the point where fine points of statutory interpretation are being argued, rather than major issues.

Rhode Island law requires public school districts to pay for the transportation of private school students. The constitutionality of the law has been upheld,[49] but the portion of the statute requiring private schools to declare they served students in at least one of five state transportation districts was challenged.[50] The law compels a public school district to provide transportation for a private school student within the transportation zone where the student resides. The petitioner lived within the zone where the school was located, but the public school committee sought to avoid the charge by claiming that the law did not apply to private schools serving students from out of state or from more than one transportation district. A Rhode Island justice rejected this interpretation and the plaintiff's request for *certiorari*, holding that the statute required only that the student live in the same zone where the school was located.

Massachusetts has a statute requiring transportation of private school students to schools located within the boundaries of a public district, so long as the distance exceeds two miles. The law took effect on January 1, 1984 but was not accompanied by any increase in state transportation aid to local school districts. Several public school districts filed suit, arguing that they were not obligated to fund the additional transportation costs because "Proposition 2½"[51] required the state to fund the new service if it was to be provided. Proposition 2½ was enacted to prevent the state from enacting laws mandating expenditures by local cities and towns.

State defendants sought to escape the conclusion that the statute was, in effect, not binding on localities by arguing that a "specific statute," such as the transportation requirement, took precedence over the "general" funding requirement. The Massachusetts high court rejected this argument, as well as the suggestion that general

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49. Jamestown School Comm. v. Schmidt, 699 F.2d 1 (1st Cir. 1983), *cert. denied*, 464 U.S. 851 (1983).

50. Cumberland School Comm. v. Harnois, 499 A.2d 752 (R.I. 1985).

51. Mass. Gen. Law ch. 29 § 27C (1983).

Eminent Domain

A Georgia school district could condemn part of a parcel of property for a building site with the remainder subject to reversion.[58] Massachusetts landowners whose land was taken by a school district were entitled to interest on their damages at a rate of 10% from the year of taking, even though 6% was the statutory rate initially.[59] One other case was reported.[60]

Zoning

In the Eleventh Circuit, city ordinances were held unconstitutional which prohibited establishments dispensing alcoholic beverages from permitting nudity if they were located within 750 feet of specific public uses, such as schools.[61] Owners who had purchased Indiana school property used as a "bus barn" were denied a zoning variance to operate a maintenance garage in the residential neighborhood.[62] There was no justification for a New Jersey township zoning ordinance which prohibited gasoline station use within 500 feet of specific public uses, such as schools.[63] In New York, a special use permit was denied for the establishment of a shopping center because it would create a safety hazard to children attending an adjacent elementary school.[64] An Oregon city could require a church to obtain a conditional use permit to operate a school on its premises.[65] Other cases were reported.[66]

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58. Gordy v. Cobb County School Dist., 334 S.E.2d 688 (Ga. 1985).

59. Hargrove v. Minuteman Regional Vocational Technical School Dist., 476 N.E.2d 961 (Mass. 1985).

60. Northeast Parent & Child Society v. City of Schenectady Indus. Dev. Agency, 494 N.Y.S.2d 503 (N.Y. App. Div. 1985).

61. International Food & Beverage Systems v. City of Fort Lauderdale, 614 F. Supp. 1517 (S.D. Fla. 1985).

62. Maxey v. Board of Zoning Appeals, 480 N.E.2d 589 (Ind. Ct. App. 1985).

63. Exxon Co. v. Township of Livingston, 489 A.2d 1218 (N.J. Super. Ct. App. Div. 1985).

64. Market Square Properties v. Town of Guilderland Zoning Bd. of Appeals, 491 N.Y.S.2d 519 (N.Y. App. Div. 1985).

65. Medford Assembly of God v. City of Medford, 695 P.2d 1379 (Or. Ct. App. 1985), *see* The Yearbook of School Law 1985 at 258; Medford Assembly of God v. City of Medford, 106 S.Ct. 570 (1985).

66. Visionquest Nat'l, Ltd. v. Pima County Bd. of Adjustment Dist. No. 1, 703 P2d 1252 (Ariz. Ct. App. 1985); Van Duyne v. City of Crest Hill, 483 N.E.2d 1307 (Ill. App. Ct. 1985); Lutheran High School Ass'n v. City of Farmington Hills, 381 N.W.2d 417 (Mich. Ct. App. 1985); Commco, Inc. v. Amelkin, 486 N.Y.S.2d 305 (N.Y. App. Div. 1985), *see* The Yearbook of School Law 1985 at 258.

Development

A California school district's imposition of school impact fees on a developer of a residential subdivision was related to the legitimate purpose of mitigating overcrowding in schools caused by development and did not deny the developer equal protection of the law.[67] A California county's approval of a developer's tentative tract map did not preclude it from subsequently imposing school facilities fees as a condition to the issuance of a building permit.[68] School facilities fees could be imposed on a California developer as a condition to the issuance of building permits, even though the developer's final maps were approved and recorded four years prior to the city's adoption of the fee authorization ordinance.[69] A Louisiana city ordinance requiring city council approval of sites for new schools was constitutional.[70] In Maryland, a regional swimming pool complex serving twenty-five schools and 180 people was inconsistent with local use and its construction adjacent to a townhouse development was enjoined.[71] A Mississippi county satisfied its burden of proof to establish that a real estate developer owed it school building taxes.[72] A Pennsylvania borough was entitled to building permit fees prior to a school building renovation project; its permit and inspection requirements were not preempted by the fire and panic act, school code, or administrative code.[73] One other case was reported.[74]

Roads

Where a Mississippi school district's noncompliance with a city's off-street parking ordinance caused a public nuisance in the form of

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67. Candid Enters., Inc. v. Grossmont Union High School Dist., 705 P2d 876 (Cal. 1985). *See* The Yearbook of School Law 1984 at 250.

68. Laguna Village, Inc. v. County of Orange, 212 Cal. Rptr. 267 (Cal. Ct. App. 1985).

69. Fontana Unified School Dist. v. City of Rialto, 219 Cal. Rptr. 254 (Cal. Ct. App. 1985).

70. Orleans Parish School Bd. v. City of New Orleans, 468 So. 2d 709 (La. Ct. App. 1985).

71. Chester v. Gilchrist, 497 A.2d 820 (Md. Ct. Spec. App. 1985).

72. W.H. Hopper & Assocs. v. DeSoto County, 475 So. 2d 1149 (Miss. 1985).

73. Skepton v. Borough of Northampton, 486 A.2d 1022 (Pa. Commw. Ct. 1985).

74. Council Rock School Dist. v. G.D.L. Plaza Corp., 496 A.2d 1298 (Pa. Commw. Ct. 1985).

street obstruction by traffic, injunctive relief was available to an adjacent landowner whose street access was obstructed.[75]

Property Taxes

Forty-three cases were reported, involving an advisory opinion[76] and tax apportionment in Alabama;[77] delinquent tax interest in Kansas;[78] tax allocation in Missouri;[79] tax exemptions in Montana,[80] New York,[81] and Ohio;[82] a tax levy for a nonhigh school district in Nebraska;[83] property valuation in Ohio;[84] tax referendum validity in Tennessee;[85] taxable property boundaries in Texas;[86] and others.[87]

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75. Robinson v. Indianola Mun. Separate School Dist., 467 So. 2d 911 (Miss. 1985).

76. *In re* Opinion of the Justices, 469 So. 2d 110 (Ala. 1985).

77. Dale County Bd. of Educ. v. Daleville City Bd. of Educ., 472 So. 2d 1037 (Ala. 1985).

78. Unified School Dist. No. 490 v. Board of County Comm'rs, 697 P.2d 64 (Kan. 1985).

79. Nell Holcomb Reorg. School Dist. No. R-4 v. Jackson Reorg. School Dist. No. R-2, 685 S.W.2d 565 (Mo. 1985).

80. Department of Revenue v. New Life Fellowship, 703 P.2d 860 (Mont. 1985).

81. Walker v. Board of Assessors, 487 N.E.2d 276 (N.Y. 1985). *See* The Yearbook of School Law 1985 at 264.

82. Peoples Faith Chapel v. Limbach, 480 N.E.2d 781 (Ohio 1985).

83. *In re* Box Butte County Bd. of Equal., 374 N.W.2d 235 (Neb. 1985).

84. Black v. Board of Revision, 475 N.E.2d 1264 (Ohio 1985).

85. Gibson County Special School Dist. v. Palmer, 691 S.W.2d 544 (Tenn. 1985).

86. Oake v. Collin County, 692 S.W.2d 454 (Tex. 1985).

87. Tri-Cities Children's Center v. Alameda County Bd. of Supervisors, 212 Cal. Rptr. 541 (Cal. Ct. App. 1985); Arvin Union School Dist. v. Ross, 221 Cal. Rptr. 720 (Cal. Ct. App. 1985); J.A.T.T. Title Holding Corp. v. Roberts, 328 S.E.2d 770 (Ga. Ct. App. 1985); Citizens Utils. Co. v. Illinois Pollution Control Bd., 478 N.E.2d 853 (Ill. App. Ct. 1985); St. Charles Parish School Bd. v. Louisiana Power and Light Co., 465 So. 2d 93 (La. Ct. App. 1985); Louisiana Tax Collections, Inc. v. Bear Creek Storage Co., 474 So. 2d 1337 (La. Ct. App. 1985); Prudential Ins. Co. of Am. v. Oak Park School Dist., 370 N.W.2d 20 (Mich. Ct. App. 1985); City of Detroit v. Alsip, 378 N.W.2d 603 (Mich. Ct. App. 1985); Grand Rapids Pub. Schools v. City of Grand Rapids, 381 N.W.2d 783 (Mich. Ct. App. 1985); Harper Creek School Dist. v. Leroy Township Supervisor and Assessor, 382 N.W.2d 172 (Mich. Ct. App. 1985); Salisbury R-IV School Dist. v. Westran R-I School Dist., 686 S.W.2d 491 (Mo. Ct. App. 1984); Cottonwood Gulch Found. v. Gutierrez, 699 P.2d 140 (N.M. Ct. App. 1985); Yehudi v. Assessor of Ramapo, 486 N.Y.S.2d 63 (N.Y. App. Div. 1985); Shoreham-Wading River Cent. School Dist. v. Town of Brookhaven, 486 N.Y.S.2d 277 (N.Y. App. Div. 1985); Board of Educ. v. State, 488 N.Y.S.2d 887 (N.Y. App. Div. 1985); Expressway Village, Inc. v. Brearly, 492 N.Y.S.2d 206 (N.Y. App. Div. 1985); Chartiers Valley School Dist. v. Virginia Mansions Apts., 489 A.2d 1381 (Pa. Super Ct. 1985); Pier 30 Assocs. v. School Dist., 493 A.2d 126 (Pa. Commw. Ct. 1985); *In re* Exton Dev., 494 A.2d 34 (Pa. Commw. Ct. 1985); Cox v. City of Chester, 494 A.2d 50 (Pa. Commw. Ct. 1985); Bradshaw v. Southern Fulton School Dist., 494 A.2d 76 (Pa. Commw. Ct. 1985); Tax Claim Bureau v. Chichester School Dist., 498 A.2d 44 (Pa. Commw. Ct. 1985); RHM Assocs. v. Neshaminy School

Property Sales and Leases

A California school district's agreement to sell property to its former owner was voided when the high bidder for the property brought an action against the district, former owner, and assignee.[88] An Idaho school district was required by contract to build a fence around purchased farmland, even though contemplated construction on the land was cancelled due to failure of a bond election.[89] A Mississippi county board of education had the authority to draw up a renewal lease for school trust land, impose certain conditions, and require lessee's signature.[90] A Nebraska school district lacked standing to challenge a city airport authority's land purchase.[91] A New York board of education could properly consider future tax consequences of a proposed sale of unneeded school property in determining which of two nearly identical offers would result in the best sale price.[92] Other cases were reported.[93]

Utilities

A California school district could not use a county's solid waste disposal facilities without charge.[94] A California water district could

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Dist., 498 A.2d 1010 (Pa. Commw. Ct. 1985); *In re* Borough of W. View, 501 A.2d 706 (Pa. Commw. Ct. 1985); Ripley v. Stephens, 686 S.W.2d 757 (Tex. Civ. App. 1985); Arnold v. Crockett Indep. School Dist., 688 S.W.2d 884 (Tex. Civ. App. 1985); Aldine Indep. School Dist. v. Moore, 694 S.W.2d 454 (Tex. Civ. App. 1985); Sharp v. Sinton Indep. School Dist., 696 S.W.2d 592 (Tex. Civ. App. 1985); Lampson v. South Park Indep. School Dist., 698 S.W.2d 407 (Tex. Civ. App. 1985); Valero Transmission Co. v. Hays Consol. Indep. School Dist., 704 S.W.2d 857 (Tex. Civ. App. 1985), *see* The Yearbook of School Law 1984 at 234-35 and 264; Janesville Community Day Care Center v. Spoden, 376 N.W.2d 78 (Wis. Ct. App. 1985); Elkhorn Area School Dist. v. East Troy Community School Dist., 377 N.W.2d 627 (Wis. Ct. App. 1985).

88. Hudson Properties Co. v. Governing Bd., 213 Cal. Rptr. 909 (Cal. Ct. App. 1985). *See* The Yearbook of School Law 1985 at 266-67.

89. Abel v. School Dist. No. 413, 703 P.2d 1357 (Idaho Ct. App. 1985).

90. Turney v. Marion County Bd. of Educ., 481 So. 2d 770 (Miss. 1985).

91. Nebraska School Dist. No. 148 v. Lincoln Airport Auth., 371 N.W.2d 258 (Neb. 1985).

92. New City Jewish Center v. Flagg, 490 N.Y.S.2d 560 (N.Y. App. Div. 1985).

93. Logan v. Armstrong, 694 S.W.2d 68 (Tex. Civ. App. 1985); McFarland v. Joint School Dist. No. 365, 700 P.2d 141 (Idaho Ct. App. 1985); Rosenshein v. Board of Educ., 488 N.Y.S.2d 214 (N.Y. App. Div. 1985); Board of Educ. v. Greene, 491 N.Y.S.2d 409 (N.Y. App. Div. 1985); Anderson v. Jackson County Bd. of Educ., 333 S.E.2d 533 (N.C. Ct. App. 1985); School Dist. 16-R v. Peterson, 706 P.2d 198 (Or. Ct. App. 1985); Neis v. Board of Educ., 381 N.W.2d 614 (Wis. Ct. App. 1985).

94. Anaheim City School Dist. v. County of Orange, 210 Cal. Rptr. 722 (Cal. Ct. App. 1985).

validly collect a sewer capacity right fee from a school district.[95] A Kentucky county could impose sewer user charges on a county board of education and base them on water volume used.[96] One other case was reported.[97]

BUILDING DESIGN AND CONSTRUCTION

Bonds

Public education capital outlay bonds were validated in an action brought by the Florida state board of education.[98] A Tennessee city's incidental use of facilities by elementary school students gave it no right to any proceeds from high school improvement bonds issued by the county.[99] In Texas, an independent school district has no authority to issue tax increment bonds.[100] A Texas school district's use of bond proceeds to build an indoor swimming pool was authorized, even though other uses were described by the superintendent at community meetings prior to the bond's approval by voters.[101] Refunding bonds may be issued in West Virginia without voter approval, but cannot increase the total indebtedness authorized by voters on the original bond issue.[102] Other cases were reported.[103]

Funding

A tribal school board's motion seeking to have the federal government set aside funds to renovate a high school was denied by the Claims Court.[104] One other case was reported.[105]

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95. San Marcos Water Dist. v. San Marcos Unified School Dist., 217 Cal. Rptr. 260 (Cal. Ct. App. 1985).

96. Board of Educ. v. Lexington-Fayette Urban County Gov't, 691 S.W.2d 218 (Ky. Ct. App. 1985).

97. Air Eng'rs, Inc. v. Commonwealth, 496 A.2d 1262 (Pa. Commw. Ct. 1985).

98. State v. State Bd. of Educ., 467 So. 2d 294 (Fla. 1985).

99. City of Newport v. Cocke County, 703 S.W.2d 626 (Tenn. Ct. App. 1985).

100. El Paso County Community College Dist. v. City of El Paso, 698 S.W.2d 248 (Tex. Civ. App. 1985).

101. Davis v. Duncanville Indep. School Dist., 701 S.W.2d 15 (Tex. Civ. App. 1985).

102. Board of Educ. v. Slack, 327 S.E.2d 416 (W. Va. 1985).

103. Phillips v. Maurer, 486 N.Y.S.2d 804 (N.Y. App. Div. 1985); Phillips v. Anderson County, 698 S.W.2d 76 (Tenn. Ct. App. 1985).

104. Busby School of Cheyenne Tribe v. United States, 8 Ct. Cl. 588 (1985).

105. Kent County Educ. Ass'n v. Wyoming Bd. of Educ., 378 N.W.2d 778 (Mich. Ct. App. 1985).

Competitive Bids

The low bidder on an Arizona school construction contract could refuse to enter into the contract without forfeiting its bid bond due to a good faith mistake of $400,000 on a bid of $5,000,000.[106] The low bidder on a Connecticut school construction contract could argue the defense of unilateral mistake for a $100,000 error in its bid when it promptly notified the school board of its error.[107] The low bidder on an Illinois school construction contract had standing to challenge the school board's award to the second lowest bidder.[108] In Iowa, neither taxpayers nor an unsuccessful bidder on school construction contracts had standing to allege bidding violations in the letting of the contracts.[109] A Pennsylvania school district was entitled to forfeiture of the low bidder's surety bond for failure to perform a plumbing contract.[110]

Prevailing Wages

In New Jersey, prevailing wage requirements apply to all workers, whether or not they are principals of a contractor performing a public works project.[111] Other labor cases were reported.[112]

Roofs

More than five years after accepting a certificate of completion on a Florida school, the school board's suit against the contractor and its surety for latent defects in the roof was barred as untimely.[113] A six-year statute of limitations applied to a New York school district's action against an architect and contractor for roof defects, but it was tolled for as long as the confidential professional relationship existed

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106. Marana Unified School Dist. No. 6 v. Aetna Casualty and Sur. Co., 696 P.2d 711 (Ariz. Ct. App. 1984).

107. Regional School Dist. No. 4 v. United Pac. Ins. Co., 493 A.2d 895 (Conn. Ct. App. 1985).

108. L.E. Zannini & Co. v. Board of Educ., 486 N.E.2d 424 (Ill. App. Ct. 1985).

109. Elview Constr. Co. v. North Scott Community School Dist., 373 N.W.2d 138 (Iowa 1985).

110. Muncy Area School Dist. v. Gardner, 497 A.2d 683 (Pa. Commw. Ct. 1985).

111. Department of Labor v. Titan Constr. Co., 504 A.2d 7 (N.J. 1985).

112. Local Union No. 501, IBEW v. NLRB, 756 F.2d 888 (D.C. Cir. 1985); Painters Local Union No. 164 v. Epley, 764 F.2d 1509 (11th Cir. 1985).

113. School Bd. v. Fidelity Co. of Md., 468 So. 2d 431 (Fla. Dist. Ct. App. 1985).

between the school board and architect—not the contractor.[114] Joinder of the contractor was proper in a Pennsylvania school district's action against an engineer for defective roof design and repair.[115] In South Carolina, numerous attempts to repair a defective roof and assurances by the architect, contractor, and roofer that the problems would be corrected invited a school district's delay in bringing suit, but did not toll the statute of limitations.[116] One other case was reported.[117]

Asbestos

Defendants' federal motion to consolidate twenty pretrial proceedings in the asbestos school products liability litigation was denied in the face of great opposition, inconvenience, and inefficiency.[118] A class action on behalf of all schools and school districts in the nation against a Chapter 11 debtor asbestos products company was not allowed in bankruptcy court.[119] In the First Circuit, a school district could bring actions against an asbestos products company in contract, fraud, negligence, and strict liability, but not in indemnity, nuisance, restitution, trespass, or warranty.[120] In the Third Circuit, a class consisting of essentially all public school districts and private schools in the nation was conditionally certified in an action to recover costs incurred in undertaking asbestos abatement, a limited class for punitive damages was conditionally certified and tested, and subsequent motions were denied pending the appeal of the original class order.[121] An Ohio class action by some public and private schools against asbestos products manufacturers and installers was not allowed.[122]

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114. Board of Educ. v. Thompson Constr. Corp., 488 N.Y.S.2d 880 (N.Y. App. Div. 1985).

115. Derry Township School Dist. v. Day & Zimmerman, Inc., 498 A.2d 928 (Pa. Super. Ct. 1985). *See* The Yearbook of School Law 1985 at 274.

116. Dillon County School Dist. No. 2 v. Lewis Sheet Metal Works, 332 S.E.2d 555 (S.C. Ct. App. 1985).

117. Asheville School v. D.V. Ward Constr., 337 S.E.2d 659 (N.C. Ct. App. 1985).

118. *In re* Asbestos School Prods. Liab. Litig., 606 F. Supp. 713 (J.P.M.D.L. 1985).

119. Dade County School Dist. v. Johns-Manville Corp., 53 Bankr. 346 (S.D.N.Y. 1985).

120. Town of Hooksett School Dist. v. W.R. Grace and Co., 617 F. Supp. 126 (D.N.H. 1984).

121. *In re* Asbestos School Litig., 104 F.R.D. 422 (E.D. Pa. 1984); *In re* Asbestos School Litig., 107 F.R.D. 215 (E.D. Pa. 1985); *In re* Asbestos School Litig., 620 F. Supp. 873 (E.D. Pa. 1985); *In re* Asbestos School Litig., 107 F.R.D. 369 (E.D. Pa. 1985).

122. Cleveland Bd. of Educ. v. Armstrong World Indus., 476 N.E.2d 397 (Ohio C.P. 1985).

Design and Performance

In the Seventh Circuit, a school district's action against a contractor's surety bond was stayed pending the outcome of its state court suit.[123] An Alabama school board had no obligation to accept a landscaper's proposed subcontractor.[124] A California school district's action against an architect, contractor, soils engineer, and surety for faulty construction of a high school gym was dismissed for lack of prosecution.[125]

Architect Fees

An architect could not recover from a New York school district for work allegedly performed where the complaint failed to allege a timely notice of claim.[126] A school classroom designer's fine by the Oregon board of architect examiners for the unlicensed practice of architecture was affirmed.[127]

Contractor Claims

In the Second Circuit, when a city board of education withheld payments due a contractor without a hearing, it did not violate the contractor's due process rights.[128] A supplier's suit against an Alabama school board, superintendent, and board members for work on a building project was barred by governmental immunity.[129] A contractor's suit for delay damages against Indiana school building corporations for a community schools remodeling project would not be treated according to the same stringent requirements imposed on the filing of additional cost claims.[130] In Nebraska, both a contractor and a school district were responsible for certain charges imposed by a utility in

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123. Community Consol. School Dist. No. 59 v. United States Fidelity and Guar. Co., 626 F. Supp. 461 (N.D. Ill. 1985).

124. Gradco, Inc. v. St. Clair County Bd. of Educ., 477 So. 2d 365 (Ala. 1985).

125. San Ramon Valley Unified School Dist. v. Wheatley-Jacobsen, Inc., 221 Cal. Rptr. 342 (Cal. Ct. App. 1985).

126. Murray v. LeRoy Cent. School Dist., 492 N.Y.S.2d 203 (N.Y. App. Div. 1985).

127. Merrill v. Board of Architect Examiners, 693 P.2d 1317 (Or. Ct. App. 1985); Merrill v. Board of Architect Examiners, 706 P.2d 556 (Or. 1985).

128. Signet Constr. Corp. v. Borg, 775 F.2d 486 (2d Cir. 1985).

129. Warrior Hinkle, Inc. v. Andalusia City School Bd., 469 So. 2d 1285 (Ala. 1985).

130. Osolo School Bldgs., Inc. v. Thorleif Larsen & Son of Ind., Inc., 473 N.E.2d 643 (Ind. Ct. App. 1985).

connection with construction of a building, and the district was not entitled to indemnity from the architect.[131] In a contractor's action against an Oklahoma school district for breach of an alleged agreement to appoint it as the district's purchasing agent on a construction project, the district as prevailing party was not allowed to recover attorney fees and costs.[132] In Texas, it was a question of fact whether a subcontractor on the remodeling of several elementary schools was a third-party beneficiary of the school district's prime construction contract and entitled to payment from the district in the absence of a payment bond.[133] A material supplier to a Washington school construction project, not paid by a subcontractor, sought recovery from the retainage fund too late after filing a notice of claim.[134] An architect acted without malice or bad faith when it advised a Wyoming school board to terminate its construction contract if the contractor refused to replace nonspecified sprinkler heads, despite their preliminary approval.[135] Other cases were reported.[136]

Arbitration

An arbitrator's award to an Arkansas school district against an architect, contractor, and subcontractor for structural defects in a district school was modified to provide for several liability only—not joint and several.[137] An arbitrator's award to a Kansas school board against a contractor was affirmed after the trial court had initially vacated the award.[138] An arbitrator's award denying a New Jersey school board's claim against a contractor for structural problems in a high school was vacated to allow the board's experts to testify, but the board could not consolidate the arbitration with its suit against the

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131. Overland Constructors v. Millard School Dist., 369 N.W.2d 69 (Neb. 1985).

132. Burrows Constr. Co. v. Independent School Dist. No. 2, 704 P.2d 1136 (Okla. 1985).

133. Greenville Indep. School Dist. v. B&J Excavating, Inc., 694 S.W.2d 410 (Tex. Civ. App. 1985).

134. Shope Enters., Inc. v. Kent School Dist., 702 P.2d 499 (Wash. Ct. App. 1985).

135. Dehnert v. Arrow Sprinklers, Inc., 705 P.2d 846 (Wyo. 1985).

136. McClain Co. v. Page & Wirtz Constr. Co., 694 P.2d 1349 (N.M. 1985); Kuchenski v. Kramer Sheet Metal, 377 N.W.2d 133 (N.D. 1985); Coast to Coast Mfg. v. Carnes Constr., Inc., 700 P.2d 499 (Ariz. Ct. App. 1985); Frazier Assocs. Mfrs. Representatives, Inc. v. Dabbs & Stewart, 325 S.E.2d 914 (Ga. Ct. App. 1985); Otis Elevator Co. v. Don Stodola's Well Drilling Co., 372 N.W.2d 77 (Minn. Ct. App. 1985); Jaden Elec. Div. of the Farfield Co. v. Wyoming Valley W. School Dist., 493 A.2d 746 (Pa. Super. Ct. 1985).

137. Wessell Bros. Found. Drilling Co. v. Crossett Pub. School Dist. No. 52, 701 S.W.2d 99 (Ark. 1985).

138. Board of Educ. v. L.R. Foy Constr. Co., 697 P.2d 456 (Kan. 1985).

architect.[139] When a New Mexico school district brought suit against an architect, contractor, and bonding company, the architect's right to compel arbitration was held waived.[140] A New York school board's application to permanently stay an arbitration of claims under a construction contract was denied because the contractor should have been allowed to serve a late notice of claim.[141] One other case was reported.[142]

FACILITY MAINTENANCE, OPERATION, AND USE

Use Of Facilities

Cases included teacher organization access to a public forum in the Supreme Court, *Grand Rapids School Dist. v. Ball*,[143] a peace exposition and the equal access act in the Third Circuit,[144] teacher organization access to a public forum in the Fifth Circuit,[145] prayer meetings in a public forum in the Seventh Circuit,[146] dances and a public forum in the Eighth Circuit,[147] and religious meetings and equal access in the Tenth Circuit.[148]

Personal Injuries

Cases involved a welder's electrocution in Arkansas,[149] a student and a broken window in Connecticut,[150] a student's slip and fall in

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139. Manchester Township Bd. of Educ. v. Thomas P. Carney, Inc., 489 A.2d 682 (N.J. Super. Ct. App. Div. 1985).

140. Board of Educ. v. The Architects, Taos, 709 P.2d 184 (N.M. 1985).

141. Nyack Bd. of Educ. v. K. Capolino Design and Renovation, Ltd., 494 N.Y.S.2d 758 (N.Y. App. Div. 1985).

142. Grand Island Cent. School Dist. v. Transcom Equip. Corp., 491 N.Y.S.2d 262 (N.Y. Sup. Ct. 1985).

143. 105 S. Ct. 3216 (1985).

144. Student Coalition for Peace v. Lower Merion School Dist., 618 F. Supp. 53 (E.D. Pa. 1985); Student Coalition for Peace v. Lower Merion School Dist., 776 F.2d 431 (3d Cir. 1985). *See* The Yearbook of School Law 1985 at 109, 110, and 278.

145. Texas State Teachers Ass'n v. Garland Indep. School Dist., 777 F.2d 1046 (5th Cir. 1985).

146. May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761 (S.D. Ind. 1985).

147. Jarman v. Williams, 753 F.2d 76 (8th Cir. 1985).

148. Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985).

149. Grain Dealers Mut. Ins. Co. v. Porterfield, 695 S.W.2d 833 (Ark. 1985).

150. Bielaska v. Town of Waterford, 491 A.2d 1071 (Conn. 1985).

Florida,[151] a child's fall off of a slide in Georgia,[152] a child's fall from a tree[153] and a gym user's slip and fall[154] in Illinois, a child's fall from gym rings[155] and a student and broken glass[156] in Louisiana, a student's fractured ankle in gym class in Massachusetts,[157] a public member's slip and fall[158] and a student's rape[159] in Michigan, a roofer's wrongful death[160] and a child and a thrown snowball[161] in New York, a public member's trip and fall in Oklahoma,[162] a public member's sexual assault[163] and a student shot[164] in Pennsylvania, a student's lunchroom accident in South Dakota,[165] an employee and worker's compensation in Texas,[166] spectators and a bleacher collapse in Wisconsin,[167] and others.[168]

Property Crimes

Cases included a burglary in Georgia,[169] property damage in Louisiana,[170] and trespass in Maine.[171]

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151. Poitier v. School Bd., 475 So. 2d 1274 (Fla. Dist. Ct. App. 1985).
152. Thigpen v. McDuffie County Bd. of Educ., 335 S.E.2d 112 (Ga. 1985).
153. Newby v. Lake Zurich Community Unit Dist. 95, 482 N.E.2d 1061 (Ill. App. Ct. 1985).
154. Pedersen v. Joliet Park Dist., 483 N.E.2d 21 (Ill. App. Ct. 1985).
155. Dunne v. Orleans Parish School Bd., 463 So. 2d 1267 (La. 1985). *See* The Yearbook of School Law 1985 at 280.
156. Landry v. Jefferson Davis Parish School Bd., 478 So. 2d 194 (La. Ct. App. 1985).
157. McInnis v. Town of Tewksbury, 473 N.E.2d 1160 (Mass. App. Ct. 1985).
158. Dristy v. Waterford School Dist., 379 N.W.2d 428 (Mich. Ct. App. 1985).
159. Evans v. Detroit Bd. of Educ., 373 N.W.2d 246 (Mich. Ct. App. 1985).
160. Law v. Rochester City School Dist., 486 N.Y.S.2d 540 (N.Y. App. Div. 1985).
161. Carr v. Indian Lake School Dist., 496 N.Y.S.2d 950 (N.Y. App. Div. 1985).
162. Robinson v. City of Bartlesville Bd. of Educ., 700 P2d 1013 (Okla. 1985).
163. Joner v. Board of Educ., 496 A.2d 1288 (Pa. Commw. Ct. 1985).
164. Ziccardi v. School Dist., 498 A.2d 452 (Pa. Commw. Ct. 1985).
165. Holland v. Yankton School Dist. 63-3, 375 N.W.2d 199 (S.D. 1985).
166. Antwine v. Dallas Indep. School Dist., 698 S.W.2d 226 (Tex. Civ. App. 1985).
167. Schwetz v. Employers Ins. of Wausau, 374 N.W.2d 241 (Wis. Ct. App. 1985).
168. Beardell v. Western Wayne School Dist., 496 A.2d 1373 (Pa. Commw. Ct. 1985); DeKalb County School Dist. v. Bowden, 339 S.E.2d 356 (Ga. Ct. App. 1985); Boltax v. Joy Day Camp, 493 N.Y.S.2d 590 (N.Y. App. Div. 1985); Gomez v. City of N.Y., 496 N.Y.S.2d 216 (N.Y. Sup. Ct. 1985); Garrett v. Grant School Dist. No. 124, 487 N.E.2d 699 (Ill. App. Ct. 1985); Vince v. Ringgold School Dist., 499 A.2d 1148 (Pa. Commw. Ct. 1985); Toney v. South Carolina Dep't of Educ., 327 S.E.2d 322 (S.C. 1985); Fusilier v. Northbrook Excess & Surplus Ins. Co., 471 So. 2d 761 (La. Ct. App. 1985); Inglett v. Louisiana Power and Light Co., 464 So. 2d 790 (La. Ct. App. 1985); Catanzaro v. Wasco Prods., 489 A.2d 262 (Pa. Super Ct. 1985).
169. Jackson v. State, 335 S.E.2d 885 (Ga. Ct. App. 1985).
170. State v. Rollins, 463 So. 2d 843 (La. Ct. App. 1985).
171. State v. Jenness, 490 A.2d 670 (Me. 1985).

SCHOOL CLOSURES

Cases involved seismic testing in the Supreme Court, *Honig v. Students of the California School for the Blind*,[172] closing of an elementary school in the Fourth Circuit,[173] and closing predominately black elementary schools in the Eleventh Circuit.[174] One other case was reported.[175]

HIGHER EDUCATION

State Agencies

Cases involved degree program licensure in the District of Columbia,[176] a university's proposed change into a prison[177] and a proposed transfer of university trust lands[178] in South Dakota, and others.[179]

Board Authority

Cases involved patents and tariffs in the Federal Circuit;[180] defamation in the Fourth,[181] Seventh,[182] and Tenth[183] Circuits; interference with contractual relations in the Sixth Circuit;[184] medical malpractice in the Sixth Circuit,[185] Louisiana,[186] Massachusetts,[187] and New Mex-

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172. 105 S. Ct. 1820 (1985). *See* The Yearbook of School Law 1985 at 284.
173. Pleasant View Elementary School PTA v. Group 1 Defendants, 763 F.2d 652 (4th Cir. 1985).
174. Adams v. Board of Pub. Educ., 770 F.2d 1562 (11th Cir. 1985).
175. Connell v. St. Francis Monastery, 491 N.Y.S.2d 229 (N.Y. Sup. Ct. 1985).
176. Nova Univ. v. Educational Inst. Licensure Comm'n, 483 A.2d 1172 (D.C. 1984).
177. Kanaly v. State, 368 N.W.2d 819 (S.D. 1985).
178. Merkwan v. State, 375 N.W.2d 624 (S.D. 1985).
179. Shepherd v. Brumback, 714 P.2d 450 (Ariz. Ct. App. 1985); Pennsylvania Indus. for the Blind and Handicapped v. Commonwealth State Sys. of Educ., 485 A.2d 1233 (Pa. Commw. Ct. 1985).
180. Massachusetts Inst. of Technology v. AB Fortia, 774 F.2d 1104 (Fed. Cir. 1985).
181. Fleming v. Moore, 780 F.2d 438 (4th Cir. 1985).
182. Brown Univ. v. Kirsch, 757 F.2d 124 (7th Cir. 1985).
183. Burt v. Board of Regents, 757 F.2d 242 (10th Cir. 1985).
184. Carlson v. Highter, 612 F. Supp. 603 (E.D. Tenn. 1985).
185. Baker v. Vanderbilt Univ., 616 F. Supp. 330 (M.D. Tenn. 1985).
186. Sibley v. Board of Supervisors, 477 So. 2d 1094 (La. 1985).
187. Smith v. Steinberg, 481 N.E.2d 1344 (Mass. 1985).

ico;[188] computer purchases in the Seventh Circuit;[189] television antitrust in the Ninth[190] and Tenth[191] Circuits; trademark in the Eleventh Circuit;[192] bidding in Alaska;[193] deceptive practices in Kansas;[194] open meetings in Mississippi;[195] law school accreditation in Missouri;[196] open records in New Mexico;[197] fee recovery from a former employee in New York;[198] and others.[199]

Desegregation

Desegregation of Alabama's system of higher education was ordered in the Eleventh Circuit.[200]

Real Property

Cases involved property exchange in the D.C. Circuit,[201] development in the Third Circuit[202] and New Hampshire,[203] property taxes in

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188. Regents of the Univ. of N.M. v. Armijo, 704 P.2d 428 (N.M. 1985); Clothier v. Lopez, 711 P.2d 870 (N.M. 1985); Chavez v. Regents of the Univ. of N.M., 711 P.2d 883 (N.M. 1985).

189. Computronics, Inc. v. Apple Computer, Inc., 600 F. Supp. 809 (W.D. Wis. 1985).

190. Regents of the Univ. of Cal. v. American Broadcasting Co., 747 F.2d 511 (9th Cir. 1984).

191. Board of Regents v. NCAA, 601 F. Supp. 307 (W.D. Okla. 1984). *See* The Yearbook of School Law 1985 at 352-53.

192. University of Ga. Athletic Ass'n v. Laite, 756 F.2d 1535 (11th Cir. 1985).

193. State v. Nickerson, 711 P.2d 1165 (Alaska 1985).

194. Manley v. Wichita Business College, 701 P.2d 893 (Kan. 1985).

195. Board of Trustees v. Mississippi Publishers Corp., 478 So. 2d 269 (Miss. 1985).

196. *In re* Laclede School of Law, 700 S.W.2d 81 (Mo. 1985).

197. Newsome v. Farer, 708 P.2d 327 (N.M. 1985).

198. Albany Medical College v. McShane, 489 N.E.2d 1278 (N.Y. 1985).

199. Integrated Dev. & Mfg. Co. v. University of Minn., 363 N.W.2d 845 (Minn. Ct. App. 1985); Board of Regents v. Board of Trustees, 479 So. 2d 931 (La. Ct. App. 1985); El Camino Community College Dist. v. Superior Court, 219 Cal. Rptr. 236 (Cal. Ct. App. 1985); Edward Vantine Studios v. Fraternal Composite Serv., 373 N.W.2d 512 (Iowa Ct. App. 1985); Pet, Inc. v. University of N.C., 323 S.E.2d 745 (N.C. Ct. App. 1984); Wiggins v. Creary, 475 So. 2d 780 (La. Ct. App. 1985); Jaar v. University of Miami, 474 So. 2d 239 (Fla. Dist. Ct. App. 1985); Vythoulkas v. Vanderbilt Univ. Hosp., 693 S.W.2d 350 (Tenn. Ct. App. 1985); *In re* Winthrop Univ. Hosp., 490 N.Y.S.2d 996 (N.Y. Spec. Term 1985); Yale Literary Magazine v. Yale Univ., 496 A.2d 201 (Conn. Ct. App. 1985); Texas A&M Univ. v. University Book Store, 683 S.W.2d 140 (Tex. Civ. App. 1984); University of Tex. at Austin v. NCAA, 685 S.W.2d 409 (Tex. Civ. App. 1985).

200. United States v. Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985).

201. National Coal Ass'n v. Hodel, 617 F. Supp. 584 (D.D.C. 1985).

202. Harrisburg Hosp. v. Thornburgh, 616 F. Supp. 699 (M.D. Pa. 1985).

203. Kennett v. City of Nashua, 493 A.2d 458 (N.H. 1985).

Arkansas[204] and the District of Columbia,[205] annexation in Oregon,[206] and others.[207]

Building Design and Construction

Cases involved bonds in Arkansas[208] and Washington,[209] a contractor's claim in New York,[210] design and performance in North Carolina,[211] arbitration in South Carolina,[212] and others.[213]

Facility Maintenance, Operation, and Use

Cases involved the use of facilities in the Supreme Court, *Johnson*

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204. Off-Street Parking Dev. Dist. No. 1 v. City of Fayetteville, 683 S.W.2d 229 (Ark. 1985).

205. District of Columbia v. Trustees of Amherst College, 499 A.2d 918 (D.C. 1985).

206. Heritage Enters. v. City of Corvallis, 708 P.2d 601 (Or. 1985).

207. Kufferman v. Fairfield Univ., 497 A.2d 77 (Conn. Ct. App. 1985); Trustees of Columbia Univ. v. James, 489 N.Y.S.2d 669 (N.Y. App. Div. 1985); East Lake Fork Special Drainage Dist. v. Village of Ivesdale, 484 N.E.2d 507 (Ill. App. Ct. 1985); Illinois Inst. of Technology v. Rosewell, 484 N.E.2d 837 (Ill. App. Ct. 1985); *In re* American College, 500 A.2d 911 (Pa. Commw. Ct. 1985); Adult Student Housing, Inc. v. State, 705 P.2d 793 (Wash. Ct. App. 1985); Culver-Stockton College v. Missouri Power and Light Co., 690 S.W.2d 168 (Mo. Ct. App. 1985); University of Pa. v. Pennsylvania Pub. Util. Comm'n, 485 A.2d 1217 (Pa. Commw. Ct. 1984); Cornell Univ. v. Bagnardi, 486 N.Y.S.2d 964 (N.Y. App. Div. 1985); Jonas v. Town of Colonie, 488 N.Y.S.2d 263 (N.Y. App. Div. 1985); Dale v. Zoning Hearing Bd., 496 A.2d 1321 (Pa. Commw. Ct. 1985); Stanford Univ. v. Superior Court, 219 Cal. Rptr. 40 (Cal. Ct. App. 1985); *In re* Central Baptist Theological Seminary, 370 N.W.2d 642 (Minn. Ct. App. 1985).

208. Cortez v. Independence County, 698 S.W.2d 291 (Ark. 1985).

209. Washington Higher Educ. Facilities Auth. v. Gardner, 699 P.2d 1240 (Wash. 1985).

210. John Grace & Co. v. State Univ. Constr. Fund, 475 N.E.2d 105 (N.Y. 1984). *See* The Yearbook of School Law 1985 at 292-93.

211. Trustees of Rowan Tech. College v. J. Hyatt Hammond Assocs., 328 S.E.2d 274 (N.C. 1985).

212. Trident Tech. College v. Lucas & Stubbs, Ltd., 333 S.E.2d 781 (S.C. 1985).

213. Hofstra Univ. v. Boslet, 493 N.Y.S.2d 886 (N.Y. App. Div. 1985); Akron-Canton Chapter, Am. Subcontractors Ass'n v. Ohio Dep't of Admin. Servs., 486 N.E.2d 116 (Ohio Ct. App. 1984); Ames Contracting Co. v. City Univ. of N.Y., 485 N.Y.S.2d 259 (N.Y. App. Div. 1985), *see* The Yearbook of School Law 1984 at 271; Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs., 492 N.Y.S.2d 371 (N.Y. App. Div. 1985); J.R. Stevenson Corp. v. Dormitory Auth., 492 N.Y.S.2d 385 (N.Y. App. Div. 1985); Tarleton State Univ. v. K.A. Sparks Contractor, 695 S.W.2d 362 (Tex. Civ. App. 1985); Sigma Phi Society v. Rensselaer Fraternity Managers Ass'n, 494 N.Y.S.2d 532 (N.Y. App. Div. 1985); Benoit, Inc. v. District Bd. of Trustees, 463 So. 2d 1260 (Fla. Dist. Ct. App. 1985).

v. Pennsylvania State University,[214] crime in the Third[215] and Eleventh[216] Circuits and Wisconsin,[217] personal injuries in the Third Circuit[218] and Rhode Island,[219] and others.[220]

214. 105 S. Ct. 3537 (1985). *See* The Yearbook of School Law 1985 at 278.

215. Miller v. Rutgers Univ., 619 F. Supp. 1386 (D.N.J. 1985).

216. United States v. Posner, 764 F.2d 1535 (11th Cir. 1985). *See* The Yearbook of School Law 1985 at 289.

217. State v. O'Neill, 359 N.W.2d 906 (Wis. 1984).

218. Fassett v. Poch, 625 F. Supp. 324 (E.D. Pa. 1985).

219. Cotrona v. Johnson & Wales College, 501 A.2d 728 (R.I. 1985).

220. Wagner v. Nova Univ., 473 So. 2d 731 (Fla. Dist. Ct. App. 1985); Newbury Junior College v. Town of Brookline, 472 N.E.2d 1373 (Mass. App. Ct. 1985); Bitterman v. Emory Univ., 333 S.E.2d 378 (Ga. Ct. App. 1985); Sawyer v. State, 485 N.Y.S.2d 695 (N.Y. Ct. Cl. 1985); Pugliese v. City of N.Y., 495 N.Y.S.2d 700 (N.Y. App. Div. 1985); University of Tex. at El Paso v. Nava, 701 S.W.2d 71 (Tex. Civ. App. 1985); Allemeier v. University of Wash., 712 P2d 306 (Wash. Ct. App. 1985); Whitlock v. University of Denver, 712 P2d 1072 (Colo. Ct. App. 1985); Jansson v. Fairleigh Dickinson Univ., 486 A.2d 920 (N.J. Super. Ct. App. Div. 1985); Mead v. Nassau Community College, 483 N.Y.S.2d 953 (N.Y. Sup. Ct. 1985); Krales v. City Univ. of N.Y., 488 N.Y.S.2d 1005 (N.Y. Ct. Cl. 1985); Karp v. University of N.C., 336 S.E.2d 640 (N.C. Ct. App. 1985); United States Fire Ins. v. Gentile, 712 P2d 436 (Ariz. Ct. App. 1985); Allen v. County of Westchester, 492 N.Y.S.2d 772 (N.Y. App. Div. 1985); Kay v. Bruno, 605 F. Supp. 767 (D.N.H. 1985).

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FINANCE

Richard A. Rossmiller

Introduction / 195
Public Funds for Private Schools / 195
    Transportation / 200
Sources and Allocation of Funds / 201
    State School Finance Programs / 201
    Funds for Special Education / 206
    Federal Funds for Education / 210
School Tax Issues / 214
    Power to Tax / 214
    Relationship of School Districts to Other Government Units / 220
    Uses of School Revenues / 224

INTRODUCTION

The United States Supreme Court decided cases dealing with the use of public funds to provide programs for students in nonpublic schools as well as the recovery of title I funds improperly spent by a state. Additional litigation contesting the constitutionality of state school finance programs in New Jersey and Connecticut occurred and other cases which were decided involved the legality of reductions in state aid as a result of executive orders or administrative decisions. Several cases involving the funding of special programs for handicapped students were decided and there was continuing litigation on school taxing and spending issues.

PUBLIC FUNDS FOR PRIVATE SCHOOLS

The United States Supreme Court decided cases involving school districts in Michigan and New York whose programs were alleged to violate the first amendment. In the Michigan case, taxpayers claimed that the district's shared time and community education programs

violated the establishment clause.[1] A federal district court had ruled the programs unconstitutional and enjoined their further operation.[2] The Court of Appeals for the Sixth Circuit affirmed.[3] Both programs provided instruction at public expense to nonpublic school students in classrooms located in and leased from the local nonpublic schools by the School District of Grand Rapids.

The shared time program offered "supplementary" classes during the regular school day in subjects such as remedial and enrichment mathematics, remedial and enrichment reading, art, music, and physical education. Teachers in the shared time program were full-time employees of the public school district although some previously had taught in nonpublic schools. The community eduction program offered classes for both children and adults. These classes were taught in nonpublic schools (as well as public schools and other sites) after the close of the regular school day. Teachers in this program were part-time employees of the Grand Rapids school district and many of them were employed as teachers in the nonpublic schools in which the community education courses were offered. Although the programs were administered by a public school employee, nonpublic school administrators decided which courses they wished to offer at their school and which classrooms would be used for the program. The public school district leased the classrooms at the rate of $6 per classroom per week. Rooms used in the program were free of religious symbols or artifacts and a sign identifying it as a "public school classroom" was posted during the time the room was used for the programs. The record showed that although the shared time program was open to all students, only nonpublic school students were enrolled in the classes offered in nonpublic school buildings.

The court referred to several of its previous decisions interpreting the establishment clause of the first amendment and commented that:

> In all of these cases, our goal has been to give meaning to the sparse language and broad purposes of the [c]lause, while not unduly infringing on the ability of the [s]tates to provide for the welfare of their people in accordance with their own particular circumstances. Providing for the education of schoolchildren is surely a praiseworthy purpose.

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1. Grand Rapids School Dist. v. Ball, 103 S. Ct. 3216 (1985).

2. Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 546 F. Supp. 1071 (W.D. Mich. 1982); *see* The Yearbook of School Law 1983 at 188, and The Yearbook of School Law 1984 at 158.

3. Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 718 F.2d 1389 (6th Cir. 1983); *see* The Yearbook of School Law 1985 at 227.

> But our cases have consistently recognized that even such a praiseworthy, secular purpose cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion or religion generally or when the aid unduly entangles the government in religious matters. For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and nonreligion.[4]

The Court applied the three-part test first employed in *Lemon v. Kurtzman*,[5] namely, the purpose of the program must be secular in nature, its principle effect must be one that neither advances nor inhibits religion, and it must not unduly entangle the government in religious affairs. The Court agreed with the lower courts that the purpose of the two programs was clearly secular in nature. The Court also agreed that the programs were unconstitutional because they had the effect of promoting religion.[6] The Court stated:

> We conclude that the challenged programs have the effect of promoting religion in three ways. The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense. The symbolic union of church and state inherent in the provision of secular, state-provided instruction in religious school buildings threatens to convey a message of state support for religion to students and to the general public. Finally, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects. For these reasons, the conclusion is inescapable that the Community Education and Shared

4. Grand Rapids School Dist. v. Ball, 103 S. Ct. 3216, 3222 (1985).
5. 403 U.S. 601 (1971).
6. 103 S. Ct. at 3222.

> Time programs have the "primary or principle" effect of advancing religion, and therefore violate the dictates of the [e]stablishment [c]lause of the [f]irst [a]mendment.[7]

In the New York case, taxpayers challenged New York City's use of federal funds to finance a program in which public school teachers and other professional employees provided remedial instruction and clinical and guidance services in parochial schools.[8] The programs were funded under title I of the Elementary and Secondary Education Act of 1965 which provided financial assistance to local school districts to meet the needs of educationally disadvantaged children from low income families. The programs were conducted by teachers, guidance counselors, psychologists, psychiatrists, and social workers employed by the New York City school district who volunteered to teach in the parochial schools. The programs were supervised by public school administrators who made unannounced supervisory visits to monitor the classes. Teachers and other professionals involved in the program were directed to avoid involvement with religious activities, bar religious materials from their classrooms, and minimize their contact with private school personnel. Taxpayers brought suit in 1978 alleging that the program violated the establishment clause of the first amendment but the district court did not agree. However, upon appeal the Court of Appeals for the Second Circuit held that the programs in question violated the establishment clause.[9]

Although school officials claimed that unlike Grand Rapids, New York City had adopted a system for monitoring the religious content of the title I classes conducted in the religious schools, the Court found that the supervisory system inevitably resulted in excessive entanglement of church and state. The Court noted that the programs were provided in a pervasively sectarian environment and that ongoing inspection was required to insure the absence of a religious message in the programs. The Court commented:

> This pervasive monitoring by public authorities in the sectarian schools infringes precisely those [e]stablishment [c]lause values at the root of the prohibition of excessive entanglement. Agents of the [s]tate must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in the [t]itle I class . . . . In

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7. *Id.* at 3230.
8. Aguilar v. Felton, 105 S. Ct. 3232 (1985).
9. Felton v. Secretary, United States Dep't of Educ., 739 F.2d 48 (2d Cir. 1984); *see* The Yearbook of School Law 1985 at 228.

> addition, the religious school must obey these same agents when they make determinations as to what is and what is not a "religious symbol" and thus off limits in a [t]itle I classroom. In short, the religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought.
>
> The administrative cooperation that is required to maintain the educational program at issue here entangles [c]hurch and [s]tate in still another way that infringes interests at the heart of the [e]stablishment [c]lause. Administrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program.[10]

The Court concluded that "despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles they implicate."[11]

In Missouri, the provisions of the Elementary and Secondary Education Act which authorized payment of funds to an independent contractor for providing remedial services for educationally deprived children attending nonpublic schools were challenged.[12] The plaintiff questioned the secretary of education's decision to invoke the "bypass provision" of title I and to authorize payment of federal funds to an independent contractor who provided services in parochial schools. It was argued that this practice violated the establishment clause because the independent contractor was alleged to be a religiously affiliated and controlled organization. The Court rejected the argument that the bypass provision of title I was unconstitutional on its face, noting that the Supreme Court has held constitutional off-premise remedial instruction for students attending nonpublic schools. The court also ruled that the secretary of education acted rationally and within the scope of his authority in invoking the bypass provision for Missouri. However, the court ruled that the program, as administered

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10. 105 S. Ct. at 3238.
11. *Id.* at 3239.
12. Wamble v. Bell, 598 F. Supp. 1356 (W.D. Mo. 1984).

on the premises of parochial schools in Missouri during the school day, was unconstitutional because it violated the requirement that the government be neutral with regard to religion, while the constant on-premise monitoring or surveillance would result in excessive entanglement of the government with religion.

Transportation

The Supreme Court of Ohio decided a case involving bus transportation for children attending a nonpublic school.[13] A group of parents petitioned their local school board to provide bus transportation for their children who attended a nonpublic high school. The school board, after conducting an investigation, denied the request on the basis that it would be unreasonable and impractical. Ohio statutes specified the procedure to be used in such cases, which included mediation, a hearing before a referee, and review by the State Board of Education. The state board eventually upheld the local board's decision and the plaintiffs turned to the courts. The court noted the standard for its review required that its judgment not be substituted for that of the State Board of Education if there was any evidence to support the board's decision. However, the court could find no credible evidence to support the cost figures submitted by the local school board and accepted by the state board. The court found that the local school board had failed to substantiate its cost figures and that the cost figures which the state board had relied upon were distorted. The lower court's judgment was reversed and the case was remanded for the further proceedings.

An action was brought challenging the constitutionality of the system used in Maryland to transport nonpublic school children.[14] Maryland had not enacted a state law governing the provision of transportation at public expense for private school students. However, eleven of the state's twenty-four counties had enacted local laws authorizing provision of transportation to nonpublic school students at county expense. The thirteen counties which had not previously authorized the use of public funds to provide transportation to private school students are now without power to enact such legislation because the Maryland Court of Appeals has ruled that the field of education has been preempted by the General Assembly. The plaintiffs contended that their first amendment rights were infringed because the

13. Pushay v. Walter, 481 N.E.2d 575 (Ohio 1985).
14. McCarthy v. Hornbeck, 590 F. Supp. 936 (D. Md. 1984).

state (or its counties) do not pay for transporting their children to church-related schools and thus have interfered with their right to freely exercise their religion. The court concluded that Maryland's transportation system for nonpublic school children at most placed an indirect economic burden on the plaintiffs' right to freely exercise their religion and ruled that the school transportation system did not infringe the plaintiffs' free exercise rights.

The plaintiffs also claimed that the Maryland school transportation system violated the equal protection clause of the fourteenth amendment because it discriminated between public and nonpublic school students, and between nonpublic school students in particular counties. Applying the rational basis test, the court determined that Maryland's system of school transportation was constitutional because it was rationally related to the state's goal of conserving limited financial resources.

SOURCES AND ALLOCATION OF FUNDS

State School Finance Programs

Further action occurred in a New Jersey case in which the plaintiffs, who are children attending public schools in the state, claimed that the state's plan for funding public schools violated the "thorough and efficient" clause of the New Jersey Constitution (article VIII, section 4, paragraph 1).[15] The plaintiffs contended that the disparities in property wealth which still existed among New Jersey's school districts resulted in substantial disparities in per pupil expenditures among districts, thus depriving the plaintiffs of the thorough and efficient education guaranteed them by the state constitution. The defendants conceded the existence of disparities in the amount of money expended on public education among the state's school districts but contended that any educational inequities were not of financial origin and not attributable to the state's provisions for funding education. The issue decided by the Supreme Court of New Jersey in the present decision, however, was very narrow (i.e., to determine the appropriate tribunal to consider the evidence).

The defendants argued that the evidence should be considered first by an administrative tribunal because the subjects of the litiga-

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15. Abbott v. Burke, 495 A.2d 376 (N.J. 1985); *see* The Yearbook of School Law 1985 at 234.

tion were particularly amenable to specialized consideration and clearly related to areas of administrative regulation. The plaintiffs argued that because a constitutional issue was involved, the case should be heard initially by the courts. The court concluded that the case should first be considered by the appropriate administrative agency and ordered that the case be transferred to the commissioner of education and heard by the Office of Administrative Law (OAL). Noting the constitutional aspects of the plaintiff's complaint, the court also directed the creation of an administrative record sufficient to guide adjudication of the constitutional issues in the event of appeal. The court noted that the OAL employed administrative law judges carefully chosen and trained to provide informed and impartial consideration of the matters before them.[16]

The Supreme Court of Connecticut considered an appeal from a trial court's ruling concerning the constitutionality of the state system of educational financing.[17] The case may be considered a sequel to *Horton I*[18] in which Connecticut's existing financing system for elementary and secondary education was held unconstitutional, and *Horton II*[19] in which the procedural parameters for review of the state's system of financing public schools were set forth. In the present case, plaintiffs challenged the constitutionality of the state system of educational financing originally enacted in 1979, and subsequently amended, claiming that it failed to provide the substantially equal educational opportunity required by the Connecticut Constitution. The trial court ruled that the guaranteed tax base plan enacted in 1979 and the categorical grants for transportation, special education, and school construction were constitutional, but that subsequent amendments which repeatedly postponed full implementation of the guaranteed tax base plan were unconstitutional.

The Supreme Court of Connecticut had ruled in *Horton I* that education in Connecticut was so basic a right that any infringement must be strictly scrutinized. The court compared educational financing plans to legislative apportionment plans and concluded that:

> like legislative apportionment plans, educational financing legislation must be strictly scrutinized using a three-step process. First, the plaintiffs must make a prima facie showing that disparities in educational expenditures are more

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16. *Id.*
17. Horton v. Meskill, 486 A.2d 1099 (Conn. 1985).
18. Horton v. Meskill, 376 A.2d 359 (Conn. 1977); *see* The Yearbook of School Law 1978 at 283.
19. Horton v. Meskill, 445 A.2d 579 (Conn. 1982).

> than de minimis in that the disparities continue to jeopardize the plaintiffs' fundamental right to education. If they make that showing, the burden then shifts to the state to justify these disparities as incident to the advancement of a legitimate state policy. If the state's justification is acceptable, the state must further demonstrate that the continuing disparities are nevertheless not so great as to be unconstitutional. In other words, to satisfy the mandate of *Horton I*, a school financing plan must, as a whole, further the policy of providing significant equalizing state support to local education . . . . However, no such plan will be constitutional if the remaining level of the disparity continues to emasculate the goal of substantial equality.[20]

Applying this process, the court upheld the constitutionality of the educational financing scheme adopted in 1979 and the constitutionality of the state categorical grants for transportation, special education, and school construction. The court remanded for further proceedings the question of whether the amendments to the 1979 legislation were unconstitutional because the trial court had not applied the proper substantive standard in reaching its decision. The trial court had found the amendments unconstitutional because the defendants had failed to prove that they met a compelling state interest. However, the Connecticut Supreme Court stated that "the proper test requires the state to prove that the amendments reasonably advanced a rational state policy and that they did not result in an unconstitutionally large disparity."[21] The case was remanded to the trial court to determine whether the challenged amendments were unconstitutional and to frame appropriate orders for equitable relief.

A biennial appropriations act adopted by the Ohio General Assembly specifically allowed the governor to reduce state aid payments to local school districts. The governor later issued an executive order directing that state agencies reduce their expenditures to prevent the state's expenditures from exceeding its revenue receipts. As a result of the governor's executive order, substantial reductions were made in the funds distributed from the school foundation program to school districts in the state. A school district sought declaratory and injunctive relief charging that the reduction of state aid was arbitrary, capricious, and unlawful.[22] The trial court ruled that the governor's ex-

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20. 486 A.2d at 1106.
21. *Id.* at 1110.
22. Board of Educ., Erie County School Dist. v. Rhodes, 477 N.E.2d 575 (Ohio Ct. App. 1984).

ecutive order was within his authority and the plaintiffs appealed. The court of appeals affirmed the lower court decision. It found that the appropriations act specifically allowed the governor to reduce state aid payments, that the governor's order had the affect of a legislative enactment, and that if the governor had intended to exclude appropriations for the school foundation program from his executive order such an exception would have been included.

A Washington case involved the validity of an action of the state Superintendent of Public Instruction in deducting the proceeds a school district realized from a timber sale from its allocation of state basic education funds.[23] The trial court ruled the deduction was invalid because the superintendent had not specifically identified funds from such a source as deductible in a rule promulgated under the state's Administrative Procedure Act (RCW 34.04). The superintendent had, in fact, promulgated such a rule, but this was done after the district was notified of the deduction. The appellate court reversed the trial court's decision, holding that although the new rule was adopted after the superintendent had made the deduction, it was adopted before the end of the school year. The court reasoned that there is no finality to an allocation until the close of the accounting period. It noted that the superintendent only estimates the amount of state funding available to each district and adjusts the estimates as data become available throughout the year. The court ruled that the school district knew the amount of state funds it would receive could be changed during the accounting period and that it was never misled as to the state superintendent's intentions. The court held that the superintendent's rule was valid and, although delayed, was sufficiently timely to support the deduction.

A case decided by the Supreme Court of New Hampshire involved the construction of statutes dealing with the disposition of revenue produced by sweepstakes.[24] The New Hampshire legislature had created a sweepstakes commission in 1963 and provided that all money remaining after paying the expense of administering the sweepstakes was to be paid out to school districts on a per pupil basis. In 1983, the governor proposed that all sweepstakes revenue be transferred to the State Department of Education and be used to help fund the state's program of financial aid to local school districts. The sweepstakes produced more revenue than had been estimated and the governor and commissioner of education proposed that the surplus revenue be

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23. Ocosta School Dist. No. 172 v. Brouillet, 689 P.2d 1382 (Wash. Ct. App. 1984).

24. King v. Sununu, 490 A.2d 796 (N.H. 1985).

used to purchase computer equipment and services for local school districts. The plaintiff claimed that under the legislative scheme there was no surplus sweepstakes revenue; that any revenue beyond the amount estimated in the budget became part of the state's general fund and could not be expended without specific appropriation by the legislature. The trial court held for the governor and education commissioner and the plaintiff appealed. The Supreme Court of New Hampshire ruled that the legislation passed in 1983 served to suspend, not repeal, the previous statute, and that the defendants had confused the word "appropriation" with the term "revenue estimate." The legislature had not appropriated the amount of sweepstakes revenue estimated by the governor. Rather, it had appropriated a specific sum of money ($11,574,054) which included the "revenue estimate" of $4.7 million from the sweepstake. The state supreme court reversed the trial court's ruling, holding that any sweepstakes revenue not needed to fund the appropriation became part of the general fund and was subject to further appropriation as the legislature and governor might see fit.

The Commonwealth Court of Pennsylvania reversed its earlier decision with regard to whether a report prepared by the Office of the Auditor General represented an adjudication or merely a set of recommendations. In an earlier case,[25] the court had ruled that the auditor's report represented an adjudication and thus could properly be appealed. In the present case,[26] the court decided that under the provisions of the Public School Code of 1949 the auditor general had no statutory authority to approve or disapprove the payment of state subsidies to school districts; the auditor general merely made recommendations to the Pennsylvania Department of Education that state subsidies be withheld. The Pennsylvania School Code placed upon the secretary of the department of education a duty to withhold subsidies under certain conditions (e.g., if payments had been made to improperly certified teachers). The court concluded that it is the department of education, not the auditor general, which is given statutory authority for issuing a final order. Since the department had granted the school district a meeting with its audit review committee before taking any action on the audit findings, the court dismissed the appeal.

A similar conclusion was reached in a second Pennsylvania case in which an intermediate unit filed a petition for review of a report

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25. School Dist. of Lancaster v. Department of Educ., 458 A.2d 1024 (Pa. Commw. Ct. 1983); *see* The Yearbook of School Law 1984 at 223.

26. School Dist. of Lancaster v. Pennsylvania, 489 A.2d 963 (Pa. Commw. Ct. 1985).

issued by the auditor general.[27] The court found that the Pennsylvania School Code does not give the auditor general independent authority to affect the property rights of intermediate units; that the auditor general can only issue recommendations which are subject to final approval by the department of education.

Funds for Special Education

Illinois law required the parents of a developmentally disabled child placed in a private facility to pay up to $100 per month toward the cost of such placement. In a case decided by the Court of Appeals for the Seventh Circuit, the child and his parents initiated a class action alleging that the statute violated the Education for All Handicapped Children Act (P.L. 94-142), which requires that all handicapped persons between the ages of three and twenty-one be provided a "free appropriate public education."[28] The child originally had been placed in a private institution, the New Hope Living and Learning Center, and the state reimbursed the parents for all instructional and living expenses except for $100 per month. The parents appealed to the Illinois state courts and won a judgment requiring the state to pay the bills in full. In the meantime, the child had been moved to another private institution, Willow Glen Academy, and again the parents were required to pay $100 per month toward his living expenses. The parents again appealed and when the appeal was not decided within the time required by federal law, the parents turned to the federal courts. The district court permanently enjoined the state from requiring such payments and ordered it to reimburse members of the class for living expenses which the state had not paid since 1978, the date when the pertinent provisions of the Education for All Handicapped Children Act took effect. The state appealed both the permanent injunction and the order regarding retroactive reimbursement to parents.

The court of appeals stated that "what the [s]tate of Illinois has done is to carve out a class of handicapped children and deny them the full reimbursement that the Education for All Handicapped Children Act, as authoritatively construed in a regulation that the state does not challenge, entitles them to . . . . The state might as well have said, we choose to classify as developmentally disabled those children whose only need is for special education."[29] The court determined that

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27. Northeastern Educ. Intermediate Unit No. 19 v. Pennsylvania, 489 A.2d 966 (Pa. Commw. Ct. 1985).

28. Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985).

29. *Id.* at 1406.

the district judge had erred in ordering reimbursement to the parents beyond what was necessary to clear outstanding bills which if not paid would cause the handicapped children to be expelled from the institutions in which the state had placed them. Accordingly, the permanent injunction and the portion of the district court's order directing the state to pay the bills for living expenses of students were affirmed, but the portion of the order directing the state to reimburse parents for bills they had already paid was reversed.

A class action was brought in New York challenging the rate setting procedures established by the state for tuition reimbursement to private schools which provided services to handicapped children who could not be placed in public school programs.[30] It was claimed that the handicapped students were deprived of their due process and equal protection rights under the fourteenth amendment as well as their rights under the Education for All Handicapped Children Act and section 504 of the Rehabilitation Act of 1973. Article 89 of New York State Education Law authorizes local boards to enter into contracts with private institutions for the education of handicapped children, provided that the private institution and the specific contract have received prior approval of the commissioner of education. The commissioner is required to develop reimbursement procedures for approved private schools and these procedures must be approved by the state director of the budget. Once approved, the commissioner must apply the procedures to determine the annual tuition reimbursement rate for each private school. Prior to the 1983-84 school year, the state department of education had adopted a new reimbursement system under which an individual school's costs were subject to various "screens" reflecting statewide or regional averages. If a school's cost figures were above the allowable screen, they were disallowed pending an appeal or justification of the higher cost. The plaintiffs alleged that the revised methodologies were inconsistent with the mandates of P.L. 94-142 and infringed upon their due process and equal protection rights. Several problems in the new methodologies were alleged (e.g., that there was no clear, consistent written statement explaining the new system; that the procedure for calculating the various rates was secretive; and that there was no true appeal process).

The court could find in New York law no constitutional right for private schools to receive full tuition reimbursement. The court noted that reimbursement rates for each school were set at the beginning of

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30. Andrew H. v. Ambach, 600 F. Supp. 1271 (N.D.N.Y. 1984).

the school year and that it was for each private school to choose, at that point, whether the reimbursement rate was acceptable. The court noted that even if a constitutionally protected interest did exist, it would not be compelling because the schools were, at worse, faced with a reduced tuition rate, not a complete termination of public support. The court stated, "more important, these plaintiffs are not the intended beneficiaries of the programs involved, but rather are merely providers of such services under the programs."[31] Concerning the new methodologies employed, the court stated, "the mere fact that no one document thoroughly analyzes or presents the new methodologies does not constitute a denial of due process . . . . Rather, due process is satisfied when an agency adopts an informal policy and applies such a policy in a relatively consistent manner."[32] Thus, the court denied the claims of the plaintiff schools. With regard to the claims of the plaintiff children, the court noted that no children actually had been displaced from private schools as a result of the new procedures for setting reimbursement rates. Thus, it ruled that the claims brought by the children were premature and granted the defendant's motion for summary judgment.

The Court of Appeals of Oregon decided a case in which parents claimed that a school district had failed to provide a free and appropriate public education for their handicapped child.[33] The Oregon Department of Education investigation determined that the district had violated state and federal laws and, therefore, awarded the parents partial reimbursement of the tuition cost they had incurred as a result of enrolling their son in a private school, but denied the parents' request for attorney fees. Both the district and the parents petitioned for review. The court determined that the department of education had proceeded properly in holding a "complaint hearing." It ruled, however, that while the department had statutory authority to withhold funds from the district, it was without authority to require the district to pay money directly to a parent. The court decided that while the record was adequate to determine that the boy's private placement was necessary, it was not adequate to determine whether the placement was appropriate. Therefore, the case was remanded to the department of education for further investigation. Concerning the parents' right to attorney fees, the court determined that if the parents' claim prevailed, the department had authority to award attorney fees under authority of the Rehabilitation Act of 1973.

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31. *Id.* at 1282.
32. *Id.* at 1283.
33. Laughlin v. School Dist. No. 1, 686 P2d 385 (Or. Ct. App. 1984).

A school district sought an injunction against the Alaska Department of Education alleging that the department lacked jurisdiction to conduct a hearing regarding whether the school district must repay some of the special education funds it had received.[34] The trial court ruled in favor of the department and the district appealed. The department had informed the school district of its determination that the district had been overpaid special education funds during the 1980-81 school year and would be required to return the excess amount it had received. The school district requested a hearing, but the hearing was not held until nine days after the end of the thirty-day period specified in the department's regulations. The district claimed that the department was guilty of laches because it had waited too long to request repayment and that the thirty-day deadline for conducting the hearing was mandatory. The Supreme Court of Alaska found no merit in the laches argument because the department had notified the school district in 1982 that its audit division had found an overpayment. The school district had not demonstrated that any prejudice resulted from the department's delay in seeking return of the overpayment of special education funds. The court also held that the regulation in question was directory, not mandatory, and that the department's slight delay in holding a hearing amounted to substantial compliance where there had been no substantial prejudice to the district's interest.

In New York, a handicapped child's mother sought to have the county pay the cost of her child's tuition and maintenance at summer camp.[35] The child's tuition and maintenance cost had been paid for the 1983 summer program because he was a handicapped child requiring special education services. When the mother sought an order directing the county to pay the child's tuition and maintenance cost for a 1984 summer camp program it refused, contending that reevaluation of the child's condition, of the need for the particular program chosen, and the suitability of the camp was required. The appellate court agreed with the county. It reversed the trial court's order because substantial issues of fact existed concerning possible changes in the child's condition and the suitability of the program or facility chosen for the summer program.

A California school district sought review of administrative decisions by the state superintendent ordering it to reimburse to the parents the cost of a private school placement for a handicapped child.[36]

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34. Copper River School Dist. v. Alaska, 702 P2d 625 (Alaska 1985).
35. Schwartz v. County of Nassau, 489 N.Y.S.2d 274 (N.Y. App. Div. 1985).
36. LaPointe v. John K., 216 Cal. Rptr. 557 (Cal. Ct. App. 1985).

The trial court ruled against the parents and they appealed. The child had a history of handicapping conditions including a speech disability and a learning disability. His performance and behavior deteriorated badly during his eighth grade year and he became a ward of the juvenile court. His first individualized educational program (IEP) was prepared in November 1976 and a second IEP was prepared in June 1977. A third IEP prepared in September 1977 specified that the boy would remain in a regular program with assistance from a resource specialist. Despite the deterioration in his behavior during the 1977-78 school year, and the fact that he became a ward of the juvenile court when he started high school, the IEP was not changed. His problems continued, but the school district neither reassessed the child nor developed a new IEP. His parents finally placed him in a private school in Utah in March 1979. In April 1979, the parents met with school district personnel to develop an IEP which recognized the child's educational handicap, but the district agreed to pay only the "educational cost" of the child's placement in a private school. The school district claimed that because the child's parents had unilaterally placed him in a private residential school, they had violated the "stay put" provisions of the Education for All Handicapped Children Act and therefore were not entitled to reimbursement. The court agreed that the parents had violated the "stay put" requirements but noted that recent cases have evidenced greater flexibility in applying the "stay put" requirement. The court concluded that the right to reimbursement following unilateral placement depends upon whether the school district had fulfilled its obligation to provide an appropriate education for the child by proposing and implementing an appropriate IEP. The court found that the child's placement was entirely inappropriate and that the district had clearly violated the requirement that there be an annual review of the IEP. The court concluded that "on balance, . . . we find that appellants have demonstrated exceptional circumstances, including bad faith on the part of respondents, which justify the unilateral placement of John in a private residential facility."[37] Accordingly, the judgment was reversed and the case remanded to determine the amount of reimbursement and attorney fees to be awarded.

Federal Funds for Education

The United States Supreme Court decided a case in which the

37. Id. at 567.

state of Kentucky was alleged to have used federal funds to supplant state expenditures for educating disadvantaged children rather than supplementing the state's expenditures as required by title I of the Elementary and Secondary Act of 1965.[38] The Court of Appeals for the Sixth Circuit reversed the United States Secretary of Education's decision because it found no evidence of bad faith and because the state's programs complied with a reasonable interpretation of the law.[39] The Supreme Court, however, disagreed with the standard applied by the court of appeals and reversed the decision. The Court held that the demand for repayment of improperly used funds was an effort to collect upon a debt, not a penal sanction. Therefore, the relevant question was whether the secretary of education had properly determined that Kentucky failed to fulfill the assurances it had made. The Court also found that neither substantial compliance by the state nor the absence of bad faith on the part of the state absolved it from liability for repayment of the funds. The Court stated that the secretary of education was correct in deciding that Kentucky had violated the provisions against supplanting state funds with federal funds. The Court concluded that, "the programs approved by Kentucky for fiscal year 1974 clearly violated then-existing requirements for [t]itle I, and therefore neither ambiguity in the application of those requirements to other situations nor the policy debates that later arose within the Office of Education avail the [s]tate here."[40]

The state of New Jersey also sought review of a final decision by the secretary of education requiring the state to refund money it had received under the provisions of title I of the Elementary and Secondary Education Act of 1965.[41] The Supreme Court previously had held that the federal government may recover misused funds from the states.[42] The present decision dealt with whether substantive provisions of the 1978 amendments to the Elementary and Secondary Education Act should be applied retroactively in determining if title I funds were misused in earlier years. New Jersey argued that the 1978 amendments, which relaxed eligibility requirements for local schools, should be applied in determining whether funds were misused during the years 1970-72. The court of appeal's presumption that statutory amendments apply retroactively to pending cases was found to be in-

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38. Bennett v. Kentucky Dep't of Educ., 105 S. Ct. 1544 (1985).

39. Kentucky, Dep't of Educ. v. Secretary of Educ., 717 F.2d 943 (6th Cir. 1983); *see* The Yearbook of School Law 1985 at 240.

40. Bennett v. Kentucky Dep't of Educ., 105 S. Ct. 1544 (1985).

41. 105 S. Ct. at 1555.

42. Bell v. New Jersey and Pa., 103 S. Ct. 2187 (1983); *see* The Yearbook of School Law 1984 at 225.

appropriate. The Supreme Court stated:

> Both the nature of the obligations that arise under the [t]itle I program and *Bradley* itself suggest that changes in substantive requirements for federal grants should not be presumed to operate retroactively. Moreover, practical considerations related to the administration of federal grant programs imply that obligations generally should be determined by reference to the law in effect when the grants were made.[43]

The Court could find nothing in the statutory language or the legislative history to indicate that Congress intended the standards established by the 1978 amendments to apply retroactively. The Court stated:

> The role of a court in reviewing a determination by the Secretary that funds have been misused is to judge whether the findings are supported by substantial evidence and reflect application of the proper legal standards . . . . Where the Secretary has properly concluded that funds were misused under the legal standards in effect when the grants were made, a reviewing court has no independent authority to excuse repayment based on its view of what would be the most equitable outcome.[44]

The decision of the court of appeals was reversed and the case remanded for further proceedings.

The application of a Massachusetts school district for federal funds for its vocational education program was denied by the Massachusetts Department of Education and it sought review of the department's decision.[45] The department had submitted a statewide plan, as required by title II of the Education Amendments of 1976, which was approved by the United States Department of Education. The approved plan provided that a school district would be ineligible to participate unless it reimbursed other institutions for out-of-district tuition fees for students enrolled in an approved vocational education program. The Rockland School Committee's application was denied because the town of Norwood had not been reimbursed for expenses it incurred in providing post-secondary vocational training to four students who were residents of the Rockland school district. The school committee contended that the provisions of the Massachusetts plan

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43. Bennett v. New Jersey, 105 S. Ct. 1555, 1559 (1985).
44. *Id.* 1563.
45. School Comm. v. Massachusetts Dep't of Educ., 753 F.2d 169 (1st Cir. 1985).

violated the federal act, and that it had not violated the state reimbursement law, or if it had, that the state education department was estopped from denying its application on that ground. The Court of Appeals for the First Circuit rejected the school committee's argument and affirmed the state education department's decision. The court held that the federal act did not prevent Massachusetts from incorporating a requirement of interlocality reimbursement into its state plan as a condition of eligibility; that it was not unreasonable for the department hearing officer to determine, based on the facts presented, that Massachusetts law was violated by the failure to reimburse the town of Norwood; and that the school committee shared responsibility for that failure.

A Michigan school district carried to the Court of Appeals for the Sixth Circuit its attempt to have declared unconstitutional the Michigan state aid laws which dealt with the treatment of federal impact aid.[46] The school district, a taxpayer of the district, and a student enrolled in the schools of the district appealed a federal district court decision granting summary judgment for the defendants.[47] They charged that the Michigan school aid law did not provide an "equalized formula" as contemplated by the federal impact aid law [20 U.S.C. section 240(d)(2)(A)], that the state's school aid program failed to comply with the requirements of the Michigan Constitution, and that the equal protection and due process guarantees of the federal and state constitutions were violated. The court of appeals generally agreed with the district court's disposition of the claims. However, it concluded that a federal court is barred by the eleventh amendment from considering claims against state defendants based on alleged violations of the state constitution. It directed the district court to remand the claims to the state court, but upheld the decision of the district court with regard to the other issues in the case.

A case dealing with federal impact aid also was decided by the Court of Appeals for the Ninth Circuit.[48] The impact aid law provides that for each child whose parents live or work on nontaxable federal property a local educational agency is entitled to receive an amount based on the amount spent from local revenues per child in "generally comparable" school districts [20 U.S.C. section 238(d)(3)(A)]. The secretary of education has promulgated regulations describing two methods which generally are used to make a determination of comparabil-

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46. Gwinn Area Community Schools v. Michigan, 741 F.2d 847 (6th Cir. 1984).
47. Gwinn Area Community Schools v. Michigan, 574 F. Supp. 736 (W.D. Mich. 1983); *see* The Yearbook of School Law 1985 at 231.
48. Chula Vista City School Dist. v. Bell, 762 F.2d 762 (9th Cir. 1985).

ity. In California, a district selected approximately five other districts which it believed were generally comparable, subject to the secretary's disapproval. From the time the impact aid law was enacted in 1950, the secretary had employed a "$50 rule" under which if the average local contribution of the five selected districts is more than $50 greater than the local contribution in the subject district, they are not considered comparable. The regulations also require that the comparison districts be similar to the applicant district on at least five of fourteen criteria. In the present case, the department of eduction had decided on an experimental basis not to use the $50 rule to determine the amount to be granted local school districts. When the district's application for assistance was denied it challenged the decision and when the administrative law judge ruled against the district it appealed. The district court reversed, holding that the $50 rule was inconsistent with the legislative intent of the statute. The court of appeals reversed the district court's decision, however, holding that the legislative history of the impact aid law supported the $50 rule and that the secretary's temporary suspension of the rule did not violate the General Education Provisions Act (GEPA).

SCHOOL TAX ISSUES

Power to Tax

In a case decided in Louisiana, a school district was ordered by the trial court to accept taxes paid under protest by a public utility. The school district appealed and the appellate court affirmed the trial court's ruling.[49] The district had filed a "rule for taxes" and sought an order directing the public utility to pay the tax levied plus interest and penalties. The public utility did not deny the tax was owed but tried to tender under protest the full amount due. When the district refused to except the tender the public utility filed a motion to dismiss the rule for taxes claiming that under Louisiana law a taxpayer was entitled to pay under protest the amount alleged to be due and then within thirty days institute a suit to recover the payment. The court's decision turned on the question of whether a "rule" is a "suit" as contemplated by the statute in question. The court found that the tender of the amount due satisfied the rule and determined that the trial

49. St. Charles Parish School Bd. v. Louisiana Power and Light Co., 465 So. 2d 93 (La. Ct. App. 1985).

judge acted properly in dismissing the action. The court noted that tax statutes are to be interpreted liberally in favor of the taxpayer, and if a statute can reasonably be interpreted in more than one way, the interpretation most favorable to the taxpayer should be adopted.

A taxpayer in an Illinois case contended that school districts which had previously created working cash funds had no authority to issue bonds to replenish those funds, and that taxes levied to pay principal and interest on such bonds were invalid.[50] The case eventually reached the Supreme Court of Illinois which ruled that:

> The intent of the statute is to provide funds which may be available for transfer to the operating funds of the district, such as its educational, operations, building or maintenance funds, and repaid to the working cash fund upon collection of the anticipated taxes. To require that in order to have authority to issue bonds a school district must abolish its working cash fund, thus effecting a transfer of funds into its educational fund, is repugnant to the explicit statutory requirement that funds transferred from the working cash fund be repaid.[51]

The court ruled that the Illinois School Code explicitly authorized the issuance of bonds to increase working cash funds and upheld the validity of the taxes required to pay principal and interest on the bonds.

In an Ohio case, the value of a building for real estate tax purposes was at issue.[52] The Cleveland Board of Education had filed a complaint against the owners of the building seeking an increase in its assessed value. Based on evidence and testimony submitted at a hearing, the assessed valuation of the building was increased substantially and the owner appealed. The trial court permitted the parties to supplement the record established at the hearing but did not permit a trial *de novo*. Based on its review of the evidence, the trial court essentially upheld the valuation of the property. The Supreme Court of Ohio ruled that a trial *de novo* was not required. The court determined that the property owner's constitutional rights had been adequately protected and that the trial court correctly assessed the substantial body of evidence in calculating the fair market value of the property. It also ruled that the level of assessment was not discriminatory and that application of the assessment rate was in accordance with Ohio law.

226

50. *In re* Walgenbach, 470 N.E.2d 1015 (Ill. 1984).

51. *Id.* at 1017.

52. Black v. Board of Revision of Cuyahoga County, 475 N.E.2d 1264 (Ohio 1985).

A taxpayer in New York sought to annul the assessor's rescission of its exemption from school taxes on real property improvements.[53] The court of appeals held that once a town assessor completes the assessment roll the assessor has no authority to rescind an exemption even if it was granted in error.

In Texas, a religious association sought a declaratory judgment to determine whether all or part of real property used as a youth ranch qualified for exemption from property taxes.[54] The trial court ruled that the property was not exempt from taxes and the association appealed. The appellate court affirmed but assessed one-half the court costs against the school district. The school district appealed and the Supreme Court of Texas ruled that the school district, as a taxing unit, was not liable for court costs in a suit to collect taxes.

The Supreme Court of Texas also ruled in a case in which a school district brought suit to recover delinquent school taxes.[55] The trial court ruled in favor of the school district, the appellate reversed, and the school district appealed. The Benavides Independent School District had originally included the city of Freer and had been authorized by its voters to issue bonds and levy a tax to retire the bonds. In 1976, Freer voted to assume control of the schools within its city limits and established a municipal independent school district. Later, the Freer Municipal Independent School District extended its boundaries by petition but only for school purposes. As a result of this extension of boundaries, the taxpayer's property became part of the Freer school district. The taxpayer claimed that the taxes in question were illegal because they had never been approved by a vote in the Freer school district, although it was undisputed that all taxpayers did have the opportunity to vote in the original tax election conducted by the Benavides school district. The Supreme Court of Texas ruled that the taxpayer was liable for the delinquent taxes, because when Freer took control of its schools by disannexation from the Benavides district and extended its boundaries for school purposes, it became responsible for a portion of the debt outstanding against the Benavides district and it derived the power to tax to retire those bonds. The court further noted that the Texas Constitution (article VII, section 3-B) specifically authorizes independent school districts to tax for school purposes in instances in which the district was formed wholly by disannexation

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53. Niagara Mohawk Power Corp. v. Town of Onondaga, 471 N.E.2d 138 (N.Y. 1984).

54. Leander Indep. School Dist. v. Texas Conference Ass'n of Seventh Day Adventists, 679 S.W.2d 487 (Tex. 1984).

55. Freer Mun. Indep. School Dist. v. Mangus, 677 S.W.2d 488 (Tex. Civ. 1984).

from an existing independent school district that possessed the power to tax.

A school district also sought to recover delinquent taxes in another Texas case.[56] The trial court entered judgment in favor of a water control district and a school district which included taxes, penalties, interest, attorney fees, and an abstractor's bill. At issue in the appeal was the amount of attorney fees awarded and the reasonableness of the abstractor's charges. The appellate court reduced the award for attorney fees in accordance with the Texas statutes which govern their recovery and held that the abstractor's charges were reasonable.

Another Texas case involved the question of whether a husband and wife were entitled to a homestead exemption from school taxes on their residence.[57] The husband, who owned the property claimed as the homestead, was under the age of sixty-five during the 1982 tax year, but his wife was over the age of sixty-five. Their application for the homestead exemption was denied by the appraisal review board but the trial court ruled in favor of the couple. The court of appeals reversed, finding that the Texas tax code specifically restricts the homestead exemption to the owner of the property. The owner in this instance was the husband, who was not yet sixty-five years of age and thus did not qualify for the exemption during the 1982 tax year.

The Crockett Independent School District brought an action to recover allegedly delinquent property taxes owed by a landowner in the district.[58] The court noted that under the circumstances of this case, the taxpayer had the difficult burden of establishing that the value assessed on each parcel of property was grossly excessive. However, the court's review of the evidence led it to conclude that the trial court's findings concerning the market value of the property were contrary to the great weight and preponderance of evidence. The case was remanded for a new trial for determination of the reasonable cash market value of each piece of property for each taxable year so that a proper determination of the taxes, penalties, interests, and attorney fees could be made. The court of appeals ruled that the district was exempt from liability for any court costs at either the trial court level or the appeal level.

Several banks brought an action against a Texas school district charging that in determining the taxable value of the shares of bank

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56. Lakeridge Dev. Corp. v. Travis County Water Control and Improvement Dist. No. 18, 677 S.W.2d 764 (Tex. Civ. App. 1984).
57. Ripley v. Stephens, 686 S.W.2d 757 (Tex. Civ. App. 1985).
58. Arnold v. Crockett Indep. School Dist., 688 S.W.2d 884 (Tex. Civ. App. 1985).

stock, federal government obligations were included as part of the banks' assets.[59] The assessor had determined the value of the shares of stock by using the "equity capital formula," the usual method used in Texas to arrive at the value of such property for tax purposes. However, this procedure included in the calculations obligations of the United States which are exempt from taxation. The plaintiffs appeared before the board of equalization and, although members of the board expressed sympathy for the situation, the values submitted by the assessor were not changed. The court was exceedingly critical of the burden placed on Texas taxpayers which makes it virtually impossible for them to complain successfully of errors or omissions from which they suffer. The court held that the trial court should have invalidated the illegal assessments imposed on the banks and commented:

> A tax "plan" which requires the taxation of exempt property is blatantly illegal. It is not only "fundamentally" wrong, it is indefensibly wrong. There is no reason for courts to protect such illegal action by penalizing the taxpayer and rewarding the wrongdoer by resort to judicially-invented doctrines designed to insure that government collects taxes illegally imposed.[60]

A corporation filed suit in Missouri to recover property taxes it had paid under protest because it claimed that the Missouri "rollback" provisions were violated.[61] The rollback provision (section 137.073, RS Mo. 1978) was adopted to prevent windfalls to taxing authorities which might occur because of increases in the assessed valuation of property. The Supreme Court of Missouri found that in this instance the increase in property taxes was caused by the district's increase in its estimate of need, not by an increase in its assessed valuation. Because the amount of tax revenue collected was virtually identical to the district's estimate of need, there was no need for a rollback because no windfall existed. Consequently, the corporation was not allowed to recover the taxes it had paid under protest.

A Pennsylvania township and a school district filed an equity action seeking to protect their interest in any additional property taxes which might arise as a result of an increase in the assessed value of a taxpayer's property.[62] The trial court dismissed the com-

59. Charles Schreiner Bank v. Kerrville Indep. School Dist., 683 S.W.2d 466 (Tex. Civ. App. 1984).

60. *Id.* at 473.

61. ASARCO, Inc. v. McHenry, 679 S.W.2d 866 (Mo. 1984).

62. Chartiers Valley School Dist. v. Virginia Mansions Apartments, Inc., 489 A.2d 1381 (Pa. Super. Ct. 1985).

plaint and the township and school district appealed. The appellate court affirmed because it determined that under Pennsylvania law, actions relating to the collection of taxes are statutory in nature, and that equitable relief is appropriate only where the statutory remedy is inadequate. The court found the appellants had attempted to resort to equity without first exhausting statutory remedies which, if followed in a timely way, would have adequately protected their interest.

In another Pennsylvania case, a school district brought action against a taxpayer in an attempt to collect unpaid occupation taxes.[63] The school district had enacted an occupation tax resolution in 1968 at a 100 mill rate. The district reduced the rate to seventy-five mills for the 1971-72 fiscal year and to sixty mills beginning with the 1978-79 fiscal year. These reductions were put into effect without specifically enacting a new occupation tax resolution as required by the statutes. The court ruled that the statute required the school district to enact a new occupation tax resolution whenever it reduced occupation taxes, that the school district did not substantially comply with the statute, and that the district's failure to comply rendered its attempted reductions of the occupational tax rate invalid. Consequently, the original occupation tax rate, 100 mills, continued in effect. The court ruled that the statute was mandatory so that the school district's failure to comply with its provisions rendered the attempted changes invalid. The court also noted that since a suit to compel payment of local taxes must be instituted within three years of the date the tax was originally due, the school district could not collect from other taxpayers the difference between the 100 mill rate actually in effect and the rate the district applied during the years 1971 through 1979. The taxpayer was ordered to pay the occupation tax for the eight years in question at the same rate which had been applied to other district taxpayers.

A case arising in Philadelphia involved the question of whether property was used for a "public purpose" and therefore exempt from taxation.[64] The Philadelphia School District had imposed a local use and occupancy tax on tennis courts constructed and operated on property owned by the city, leased by a municipal agency, and sublet to Pier 30 Associates. The court concluded that in the absence of evidence establishing that the lessee's use of the property was furthering the purpose of the governmental agency from which it was leased, it

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63. Bradshaw v. Southern Fulton School Dist., 494 A.2d 76 (Pa. Commw. Ct. 1985).

64. Pier 30 Associates v. School Dist. of Philadelphia, 493 A.2d 126 (Pa. Commw. Ct. 1985).

must be concluded that the property was not serving a public purpose and was not tax exempt.

A New York case dealt with the question of whether school districts in Nassau County "levied" taxes and thus were entitled to opt out of tax exempt provisions.[65] A law enacted in New York in 1976 made available a declining ten-year tax exemption for real property used for business, commercial, or industrial activity. Certain taxing authorities also were authorized to opt out of the tax exemption provision. The primary issue presented in the case was whether school districts in Nassau County "levy" school taxes. Based upon its analysis of the legislative history of the act, as well as case law and administrative opinions dealing with it, the court concluded that school districts do levy taxes within the meaning of the statute and therefore were authorized to exercise the option of reducing the business investment exemption.

Relationship of School Districts to Other Government Units

A Massachusetts school committee brought action to compel a town accountant to charge all purchase orders delivered to her during fiscal year 1983 to its fiscal year 1983 budget.[66] The accountant had issued a memorandum stating that the school committee must submit to her by June 10, 1983 all purchase orders it proposed to have charged against its fiscal year 1983 budget. The school committee took the position that Massachusetts statutes gave it authority to determine expenditures within the total appropriation it had received. The accountant, however, insisted that unless the committee could demonstrate that purchases had been included in the fiscal year 1983 budget she would charge them to the fiscal 1984 budget. The court agreed with the school committee and ruled that if school funds appropriated for fiscal year 1983 were spent or encumbered in that fiscal year they were to be charged to the 1983 appropriation.

A city school district in Tennessee sought a declaration that the county owed the school district its prorata portion of payments in lieu of taxes received by the county from the Tennessee Valley Authority.[67] The county claimed that the school district was not entitled to share

65. Walker v. Board of Assessors, 480 N.Y.S.2d 933 (N.Y. App. Div. 1984).

66. School Comm. of Wilmington v. Town Accountant of Wilmington, 433 N.E.2d 1146 (Mass. App. Ct. 1985).

67. Oak Ridge City Schools v. Anderson County, 677 S.W.2d 468 (Tenn. Ct. App. 1984).

in the payments in lieu of taxes because they were not received from the state, county, or other political subdivision as provided by state statutes. The appellate court agreed with the trial court, holding that the payments in lieu of taxes received from the Authority were not revenues received from the state, county, or other political subdivision. Therefore, the county could not be required to distribute a prorated share of the funds to the city school district.

In Missouri, one school district brought an action against another district to recover taxes on personal property located within its boundaries, but erroneously assessed, levied, and paid to the other district.[68] The trial court refused to permit recovery of the taxes erroneously paid to the second district and the first district appealed. The property in question, a dragline, was located within the Salisbury district at the time of assessment but the assessor erroneously reported that the dragline was located within the Westran district. At the time the error was discovered the taxes had been collected by the county but not yet disbursed and the Salisbury district tried to prevent their disbursement to the Westran district. The appellate court reviewed similar cases in Missouri and in other jurisdictions. It found that the Salisbury district had no direct claim to the tax revenues in question; that the only persons with a direct interest in the revenues were the taxpayers of the affected school district.[69] The court determined that under Missouri law, the Salisbury district must demonstrate, at the very least, that it had received less than its estimate of needs for the year and thus had sustained a deficit. The record, however, showed that the district had budgeted a shortage of $144,198, which was over $66,000 more than its actual shortage so that it suffered neither a shortage nor a deficit.

A case decided by the Court of Appeals of Kentucky involved an objection by the county board of education to sewer user charges imposed upon it by the county government.[70] The board of education claimed that the sewer user charge was a tax from which it should be exempt and pointed out that the service previously had been paid from revenue from property taxes. It also claimed that using public school funds to pay the sewer user charges would be using public school funds for other than public school purposes and thus would violate the Kentucky Constitution. The appellate court affirmed the

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68. Salisbury R-IV School Dist. v. Westran R-I School Dist., 686 S.W.2d 491 (Mo. Ct. App. 1984).

69. *Id.* 499.

70. Board of Educ. of Fayette County v. Lexington–Fayette Urban County Gov't, 691 S.W.2d 909 (Ky. Ct. App. 1985).

trial court's ruling that the board of education was subject to the sewer user charges, that such charges were not a tax, that the charges bore a reasonable relationship to the service provided, and that they were for the benefit of, and necessary for, the maintenance of the public schools.

The South Carolina Department of Social Services sought repayment of funds it had provided to a school district for meals served in a day-care service provided for school children in the district.[71] Following administrative review, it was determined that the school district had been overpaid and it was ordered to reimburse the department of social services. The trial court reversed and the department of social services appealed. The Supreme Court of South Carolina determined that the school district received funds from several sources to support the program, including funds supplied by the federal government pursuant to the Social Security Act, funds from the United States Department of Agriculture, fees for day-care services, funds collected from children, and funds from a regional council. One school in the district had shown a profit by receiving more money than it spent for the meals served. The court ruled that under the terms of its contract, and the pertinent federal regulations, the school district was obligated to repay the amount by which receipts in the school lunch program exceeded expenditures for the program.

A New York case dealt with the question of how tax money was to be allocated to school districts within the town of Brookhaven when one of the major taxpayers in the town defaulted.[72] The Long Island Lighting Company refused to pay its 1983-84 property tax bill on the Shoreham nuclear power generating station which was situated entirely within the Shoreham-Wading River School District. The supervisor of the town of Brookhaven distributed tax monies to the various school districts within the town in a ratio proportional to each district's individual tax levy. Two other school districts within the town challenged the distribution, claiming they should have received their full tax levy because the defaulting taxpayer was not located in their school district. The court reviewed the relevant statute and considered past practice in reaching its decision. The court ruled that under the Suffock County Tax Act, a shortage of real property tax revenues caused by default in payment of taxes must be fairly apportioned among all school districts. It noted that when a legislative enactment

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71. School Dist. No. 5 v. South Carolina Dep't of Social Servs., 320 S.E.2d 451 (S.C. 1984).

72. Shoreham–Wading River Cent. School Dist. v. Town of Brookhaven, 486 N.Y.S.2d 277 (N.Y. App. Div. 1985).

lends itself to more than one reasonable interpretation, the practical meaning attached to it by the parties affected, when acquiesced in over an extended period of time, is highly persuasive. Consequently, the court upheld the town's action in the distribution of the school tax money.

A case decided by the Supreme Court of Rhode Island involved several issues, one of which was the authority of a regional school district financial meeting to alter or evade valid contractual obligations by refusing to sign a bargaining agreement, and by refusing to adopt the budget recommended by the district school committee.[73] One effect of the refusal to adopt the budget was an order to the superintendent to reduce teachers' salaries to the scale which existed prior to pay increases granted teachers by an arbitrator. The reason for the order was that the amount of money appropriated was only sufficient to cover the reduced salary scale and other contractual obligations of the district. The teachers reacted by going on strike. A group of parents filed an appeal with the state commissioner of education and also filed an action in the superior court. The various actions were consolidated in the present case. The Supreme Court of Rhode Island noted that "although the questions presented vary in each case, one central issue pervades the entire controversy. . . . That issue is whether a municipality or a regional school-district financial meeting can alter or evade valid contractual obligations by refusing to incorporate those obligations into its budget."[74] The court concluded that the school committee had, by its actions, clearly accepted the arbitrator's award and therefore was estopped from challenging any aspect of the award. With regard to the relationship between a school committee and its appropriating authority, the court stated:

> If school committees are authorized by law to enter into binding agreements, which they are, then the community is bound to fund that agreement through its appropriating authority, whether that authority is the city or town council, a financial town meeting, or a district financial meeting. To conclude otherwise would completely negate the statutory power of the school committee to bargain and contract.
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> . . . Therefore, we hold that a city or town is bound by and must fund the valid collective-bargaining agreements en-

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73. Exeter–West Greenwich Regional School Dist. v. Exeter–West Greenwich Teachers' Ass'n, 489 A.2d 1010 (R.I. 1985).

74. *Id.* at 1016.

tered into by its school committee as well as other obligations incurred in the providing of services mandated by law.[75]

Uses of School Revenue

The Supreme Court of Arizona decided a case in which taxpayers sought to have declared invalid a portion of a collective bargaining agreement between a school district and its teachers' association under which the association president was released from teaching duties but continued to be paid a portion of her salary.[76] The taxpayers claimed that this violated a constitutional provision prohibiting the gift of public money to a private association. In return for the portion of her salary paid by the district, the teachers' association president performed a number of activities for the benefit of the district. The district superintendent testified that the district saved between $5,800 and $15,800 compared to what it would have cost the district to hire a full-time director of employee relations. The court determined that the duties carried out by the association president and the relatively small salary she was paid by the district were not so disproportionate as to violate the constitutional prohibition. The facts presented by the district made a prima facie showing of proportionality and the plaintiffs did not refute them. The court pointed out that it was not up to the district to prove that its contract was reasonable; the burden of proof was on those who challenged the contract. The validity of the contract was upheld but the district's claim that it was entitled to attorney fees was denied. The court concluded that an award of attorney fees could have a chilling affect on other parties who might wish to question the legitimacy of the actions of public officials and thus would be contrary to public policy.

A group of Ohio taxpayers attempted to challenge certain alleged irregularities and unauthorized expenditures by a board of education.[77] They sent a letter to the city law director with a summary of the actions and expenditures which they believed to be irregular and unauthorized but the law director found no facts on which to base a civil action. The taxpayers then commenced a taxpayers' action which was dismissed by the trial court because they had failed to state a claim upon which relief could be granted. Upon appeal, however, the appel-

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75. *Id.* at 1019.
76. Wistuber v. Paradise Valley Unified School Dist., 687 P.2d 354 (Ariz. 1984).
77. Popson v. Henn, 477 N.E.2d 465 (Ohio Ct. App. 1984).

late court disagreed, holding that the notice served upon the law director was sufficient and that it had stated a claim upon which relief could be granted if the allegations were proven to be true. The case was remanded for further proceedings.

In a Texas case, a school bookkeeper was convicted of the theft of student activity funds.[78] In her appeal, she claimed that the school district had given its consent to her appropriation of the funds. The appellate court rejected this argument. It ruled that the evidence was sufficient to prove that the school district could not have given its consent because it did not know that such an appropriation was occurring. The court also pointed out that the school district was a political subdivision of the state and that its officers were totally without power or authority to consent to any payment of school district funds which was not made in return for goods or services received by the school district, or to permit any appropriation of such funds for private purposes.

A New York case involved the question of whether a board of education was authorized to use school district funds to advocate support of the district's budget and a bond resolution.[79] A former school board member petitioned the commissioner of education to direct the school board to refrain from using district funds to pay for advertisements urging votes for or against any issue and to require that members of the board of education reimburse the district for the cost of such advertisements. The commissioner dismissed the petition and the petitioner turned to the courts in an attempt to have the commissioner's determination annulled. The trial court granted the annulment and ordered the board to cease and desist, whereupon the school board and the commissioner of education appealed. The appellate court reversed, holding that the power to make reasonable expenditures to communicate the board's position on budget matters is implicit in the broad grant of power given to school boards in New York. It also stated that school board members would be held personally liable for the expenditure of district funds only when their actions were collusive, fraudulent, or motivated by personal gain.

78. Mitchell v. State, 692 S.W.2d 909 (Tex. Civ. App. 1985).
79. Phillips v. Maurer, 486 N.Y.S.2d 804 (N.Y. App. Div. 1985).

8

HIGHER EDUCATION

Robert M. Hendrickson*

Introduction / 227
Intergovernmental Relations / 227
Employees / 232
- Discrimination in Employment / 232
  - Title VI / 233
  - Title VII / 233
  - The Equal Pay Act / 240
  - Title IX / 242
  - Age Discrimination in Employment / 242
  - Rehabilitation Act of 1973 / 243
  - Hiring Discrimination / 244
- Nontenured Faculty / 244
  - First Amendment Freedom of Speech / 245
  - Nonrenewal Procedures / 245
  - Part-time Faculty / 248
- Tenured Faculty / 249
  - Termination for Cause / 249
  - Denial of Employee Privileges / 252
  - Termination Due to Financial Exigency or Program Elimination / 253
  - Denial of Employee Benefits / 254
- Administration and Staff / 256
- Collective Bargaining / 258
- Sexual Harassment of Employees / 260

Students / 261
- Admissions / 261
- Nonresident Tuition / 263
- Financial Aid / 264
- First Amendment / 267
  - Freedom of Speech / 267
  - Freedom of Expression / 268
- Dismissal / 269
  - Disciplinary Dismissal / 269
  - Academic Dismissal / 271
- Other Constitutional Privileges / 272

Liability / 274
Personal Injury / 274
Workers Compensation / 275
Contract Liability / 277
Deceptive Practices / 279
Educational Malpractice / 280
Negligence / 281
NCAA Regulations and Sanctions / 281
Antitrust / 282

*Richard B. Frink assisted in the preparation of this chapter.

INTRODUCTION

This year's litigation was again voluminous. Over 330 cases were reviewed in the preparation of the chapter. The Supreme Court ruled on the question of academic dismissal and refused to hear an appeal of a decision regarding the recognition of a gay rights organization. Title VII litigation involving discrimination against employees or applicants for positions continues to increase. One case in particular established a standard of proof of discrimination in class action cases. Sexual harassment of employees was added to the employment section of the chapter. Disputes over the award of fringe benefits and other privileges continue in significant numbers.

Student issues continue to focus in several areas. For example, nonresident tuition cases are present again this year, as are a substantial number of cases involving financial aid and loan defaults. Cheating cases dominate the section on discipline, while academic dismissal cases continue to reflect deference to academicians.

Educational malpractice cases created a new subsection in the liability section. A subsection on deceptive practices also was added. The application of NCAA regulations to students and institutions continues to result in litigation. In particular, rules surrounding eligibility were challenged in several cases.

INTERGOVERNMENTAL RELATIONS

This section is concerned with the relationships between postsecondary institutions and various governmental agencies. Litigation included questions of a municipality's authority to control construction of institutional facilities through zoning laws, conflicts over powers delegated either to the state legislature or board of trustees, the

assessment of sales tax in the transfer of a student newspaper, and whether state funds can aid private institutions. In a related case, the authority of a voluntary accrediting agency is challenged.

The section opens with a challenge to the federal government's taxing authority over a faculty offspring tuition assistance plan and retirement annuities. In Ohio, a private institution sought a refund on withholding and Federal Insurance Contribution Act (FICA) taxes assessed on foundation money paid to faculty to defray the cost of the college tuition for their children. The institution had set up a foundation to distribute funds to faculty for their children's education at an institution of their choosing. A federal district court ruled that cash tuition assistance grants were "taxable income" but were not wages requiring FICA taxes or withholding.[1] In an appeal of a lower court decision, Temple University sought an exemption from paying FICA tax on amounts employees elect to use to purchase retirement annuities which qualify for income tax deferral. Temple was asking for a refund on FICA taxes paid for these amounts for the taxable years 1979 to 1982. The Third Circuit Court affirmed the lower court decision, since no federal statutory provision supported the FICA exemption claim.[2]

Challenges to the authority of the Board of Trustees was the issue in several cases. In a Louisiana case, the Board of Trustees of Southwestern Louisiana University renamed the institution Louisiana University. The Louisiana Board of Regents brought suit, seeking to enjoin the action of the S.L.U. Board. The trial court ruled that the constitution and statutes empowering the Board of Trustees do not allow them to change the name of the institution, but confer those powers solely to the state legislature. The Louisiana Court of Appeals, in affirming the trial court decision, ruled that a subsequent statute did not render the question moot, because the trial court's interpretation was based on state constitutional provisions which supersede state statutes.[3]

In a South Dakota case, taxpayers brought an action to prevent the enforcement of legislation enacted by the state legislature to close the normal school at Springfield and turn the property over to the Board of Charities and Corrections for use as a prison.[4] The state su-

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1. Western Reserve Academy v. United States, 619 F. Supp. 394 (N.D. Ohio 1985).
2. Temple Univ. v. United States, 769 F.2d 126 (3d Cir. 1985).
3. Board of Regents of La. v. Board of Trustees, 460 So. 2d 80 (La. Ct. App. 1984).
4. South Dakota S.B. 221 (1985).

preme court found, based on the enabling act establishing the state and the state constitution, that any land given to the state for educational purposes must either be used for educational purposes or sold at fair market value and the proceeds used for education.[5] Senate Bill 221 would violate the nature of the trust, since it simply turned over the land to another state agency which is not in the business of education. The court stated that this does not mean that the state is prevented from closing the institution at Springfield, but rather that it must sell the land and use the proceeds for education.[6]

A Pennsylvania case involved the state system's purchasing powers. A law required state agencies to purchase products from a "nonprofit-making" agency for the handicapped if their products were offered at fair market value.[7] This controversy arose out of legislation which formed a separate agency for the higher education system and empowered the board and institutions to make purchases and enter into contracts.[8] The court found that, under state law, the state system of higher education was required to purchase goods offered at fair market value from the nonprofit-making agency.[9]

Another case involved the jurisdiction of the Mississippi Chancery Court over a tort liability suit against a Louisiana private university conducting business in Mississippi. The court had attached certain indebtedness owed to a Louisiana university by Mississippi corporations or individuals.[10] The university's involvements, sufficient to implicate court jurisdiction, included recruitment of students, provisions for medical services and medical education, solicitation of alumni, and membership in an athletic conference which included a Mississippi public university. The court found these contacts to be significant so as to override the immunity provisions of the Constitution under the due process clause of the fourteenth amendment.[11]

Aid to private institutions was at issue in a Washington case involving the issue of whether the sale of bonds under the Washington

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5. *See* Enabling Act, 25 Stat. 676 (1889), South Dakota Constitution art. VIII, § 7.

6. Kanaly v. State, 368 N.W.2d 819 (S.D. 1985). *See* Merkwan v. State, 375 N.W.2d 624 (S.D. 1985), for a similar ruling on the transfer of a closed university's trust land and funds.

7. 24 Pa. Admin. Code 2409.1 (Sheppard's 1929).

8. 1982 Pa. Laws § 660.

9. Pennsylvania Indus. for the Blind and Handicapped v. Commonwealth State Sys. of Educ., 485 A.2d 1233 (Pa. Commw. Ct. 1985).

10. Administrators of the Tulane Educ. Fund v. Cooley, 462 So. 2d 696 (Miss. 1984).

11. Shaffer v. Heitner, 433 U.S. 186 (1977); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

Higher Education Facilities Authority[12] for facilities at two private church-related institutions violated the state's constitutional provisions preventing the use of public funds for sectarian activities. The court found that the sale of bonds was simply the granting of the state's tax exempt status to the bonding authority. The granting of the use of the tax exempt status was neither the conferring of public money or property, nor did the scheme used by the bonding authority involve the issue of public credit or the assumption of debt by the state. Therefore, the act was held constitutional.[13]

In a Florida case, a newspaper purchased by the student government from a publisher and donated at no charge to students was ruled by a lower court to be a sale by the publisher requiring the assessment of sales tax. On appeal, the court ruled that because the newspaper was given away and not sold did not, under the tax statutes, change its definition as a newspaper exempt from sales tax.[14]

Sunshine laws were again before the court. Under Michigan's Freedom of Information Act,[15] the plaintiff sought information on grants and payments from a research institute at a public university. The plaintiff indicated that it would take approximately three months to conduct a review of the records. Since the records were on microfilm, the university required that an employee be present to monitor the review to prevent damage or destruction of the records. Absent provisions in the statute, the court ruled that a two-week time period would be adequate and that the cost for additional monitoring must be borne by the plaintiff.[16] In a Mississippi case, the court ruled that the Board of Trustees of State Institutions of Higher Learning would be subject to the open meeting provisions of the state's sunshine laws.[17]

Questions of the application of zoning laws to facilities of colleges and universities were litigated in several jurisdictions this year. In a New York case, the zoning code exempted schools, but said nothing about colleges; as a result, the zoning board required a university to seek a variance, which later was denied. The court ruled that a college is no different than other schools and ruled that the zoning law was

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12. Wash. Rev. Code § 28B.07.010 *et seq.* (1984).

13. Washington Higher Educ. Facilities Auth. v. Gardner, 699 P.2d 1240 (Wash. 1985). *See* Cortez v. Independence County, 698 S.W.2d 291 (Ark. 1985) (for a similar case involving a county's bonding authority).

14. Campus Communications, Inc. v. Department of Revenue, 473 So. 2d 1290 (Fla. 1985).

15. Mich. Code Law §15.231 *et seq.* (1979).

16. Cashel v. Regents of Univ. of Mich., 367 N.W.2d 841 (Mich. Ct. App. 1985).

17. Board of Trustees v. Mississippi Publishers Corp., 478 So. 2d 269 (Miss. 1985).

void insofar as it treated colleges differently from other institutions.[18] A Pennsylvania law[19] exempting the state university medical center from certification by the Department of Health prior to expansion of its medical facilities was challenged by other hospitals located in the metropolitan area of the medical center. The basis for the challenge was the supremacy clause, the fourteenth amendment due process clause, and the equal protection clause of the United States Constitution. The district court ruled that the state law was not in conflict with the National Health Planning and Resources Act of 1974, therefore not implicating the supremacy clause. Furthermore, the alleged loss that plaintiff might suffer because of the exemption did not implicate the due process clause. Finally, legislation aimed at promoting a public interest would survive an equal protection challenge.[20]

A number of zoning cases involved the construction of residence halls in neighborhoods near the campus. A Pennsylvania court found that dormitories fit within the meaning of educational purposes as defined in the zoning laws of the municipality. This determination affirmed the zoning board's action, awarding a private college a permit to build a dormitory in a residential neighborhood zoned for single-family dwellings.[21] In another case, petitioner filed this action in court after the community's superintendent ruled that a variance in the zoning laws was not required for a college to build a dormitory on its property zoned as residential. The petitioner also was seeking adjudication of the planning board's report of no detrimental environmental impact resulting from the college's construction plans. The court found that an administrative remedy of appeal to the zoning board existed for both the superintendent's and planning board's decisions. Failure to seek the available administrative remedy barred this litigation by petitioner.[22] A Massachusetts case involved a long drawn out battle over a zoning decision to prevent a college from utilizing a building as a residence hall. The selectmen of the community denied the college's request based simply on their discretion to do so. The institution's residence halls met the lodging house licensing requirement necessary to operate a residence hall. The appeals court found that the selectmen's action violated the "Dover Amendment,"[23] which prohibited the denial of variance for land used for educational pur-

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18. Cornell Univ. v. Bagnardi, 486 N.Y.S.2d 964 (N.Y. App. Div. 1985).
19. Health Care Facilities Act, 35 Pa. Cons. Stat. § 448.101 *et seq.* (1984).
20. Harrisburg Hosp. v. Thornburgh, 616 F. Supp. 699 (M.D. Pa. 1985).
21. Dale v. Zoning Hearing Bd. of Tredyffrin Township, 496 A.2d 1321 (Pa. Commw. Ct. 1985).
22. Jonas v. Town of Colonie, 488 N.Y.S.2d 263 (N.Y. App. Div. 1985).
23. Zoning Enabling Act, Mass. Gen. Laws Ann. ch. 40A § 3 (West 1975).

poses. While normally the court would remand the case to the selectmen for a new decision, the longstanding nature of the controversy and the selectmen's continuing effort to stop the college from opening the residence halls was an adequate basis for the superior court to order the issuance of a lodging house license.[24]

Two cases involved the issuing of a license or certification. A federal district court upheld the right of the National Association of Trade and Technical Schools, Inc. (NATTS), an accreditation agency, to withdraw the accreditation of a member trade school. The court found that NATTS had not acted in an arbitrary and capricious way and had afforded the school due process in the accreditation process.[25] The Educational Institution Licensure Commission of the District of Columbia denied an educational institution permission to award a degree within the District, since it failed to meet the minimum standards for faculty and library facilities prescribed by law.[26] The court found that neither the law nor the commission's action violated the provisions of the first amendment. Furthermore, the court noted that the criteria used by the commission were neither vague nor improperly applied in this case.[27]

EMPLOYEES

The amount of litigation surrounding employment issues continued to increase while many cases emanated from states with financial problems. Disputes ranged from charges of discrimination in employment to allegations of a breach of contract. A new section on sexual harassment of employees was added to this year's chapter.

Discrimination in Employment

Title VII litigation continued to increase, while very few cases relied on title IX as a basis for a complaint. Several cases alleging discrimination based on a physical disability were actually brought

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24. Newbury Junior College v. Town of Brookline, 472 N.E.2d 1373 (Mass. App. Ct. 1985).

25. North Jersey Secretarial School, Inc. v. National Ass'n of Trade and Technical Schools, 597 F. Supp. 477 (D.D.C. 1984).

26. D.C. Code Ann. §§ 29-815–818 (1981). To Regulate Degree-Conferring Institutions in the District of Columbia.

27. Nova Univ. v. Education Inst. Licensure Comm'n, 483 A.2d 1172 (D.C. 1984).

under state laws rather than under the Rehabilitation Act of 1973. Sexual harassment continued to be a developing area of litigation.

Title VI. Allegations of discrimination based on race involved the issues of hiring and dismissal for cause. In a North Carolina case, black extension agents alleged discrimination in salaries, hiring, promotion, and the organization and sponsorship of 4-H Club programs, in violation of title VI of the Civil Rights Act of 1964. The district court, using multiple regression analysis and specific hiring and salary data on a comparative basis, found no discrimination on the basis of race in any of the areas alleged. The Fourth Circuit Court, after a thorough analysis of both the regression analysis and the comparative data, affirmed the lower court decision.[28]

In another North Carolina case, a white male faculty member charged discriminatory treatment by a predominantly black institution. The court found that he had failed to establish a *prima facie* case. While differential treatment did exist between black and white faculty at the institution, it could be accounted for by the nature of the institution as a predominantly black college.[29]

In an Iowa case, the Eighth Circuit affirmed a lower court decision. The court ruled that the denial of the promotion of a black professor was for reason other than race. They also dismissed his equal pay claim since he had been involved in an earlier class action settlement.[30]

Title VII. This section will lead off with a case which may set the standard for future class action cases under title VII. In a very complex case involving both title VII and the Equal Pay Act (EPA), the University of Rhode Island (URI) found itself in a class action suit filed by female employees.[31] This case is a consolidation of several individual cases filed by Misses Chang, Seleen, Kraynek, and Roworth.[32] The court first analyzed the affirmative action policies of URI and found that they were characterized by a period of inaction. The court then turned to an analysis of the proof required in a class action suit under title VII. In class action, the court found that the proof beyond

28. Bazemore v. Friday, 751 F.2d 662 (4th Cir. 1984).
29. Turner v. Barber-Scotia College, 604 F. Supp. 1450 (M.D.N.C. 1985).
30. Anderson v. University of N. Iowa, 779 F.2d 441 (8th Cir. 1985).
31. Chang v. University of R.I., 606 F. Supp. 1161 (D.R.I. 1985).
32. *See* Chang v. University of R.I., 554 F. Supp. 1203 (D.R.I. 1983).

the establishment of a *prima facie* case was different than in individual law suits. Citing the *International Brotherhood of Teamsters v. United States*,[33] the court stated:

> Class action litigation implicating [t]itle VII is, however, a fundamentally different breed of cat. The essence of a class action is an endeavor to prove that there was a systemwide pattern or practice of disparate treatment or that facially neutral policies had the effect of impacting one or more protected classes in disparate and less favored ways.[34]

The focus of the proof in class action cases is not on individual cases, but rather on patterns of discrimination. The court further defined the framework for its analysis by discussing statistical analysis and the court's refusal to quibble over standard deviations but rather to use appropriate statistical analysis in combination with "anecdotal evidence" (specific facts and individual fact situations) to arrive at an overall perspective as to whether the class had been discriminated against. After defining this framework, the court analyzed the issues of the complaint one by one. These issues were hiring, rank at hiring, salary at hiring, annual compensation, tenure, and promotion.

The court found that the statistical evidence, when reviewed in light of the anecdotal evidence, failed to show that the university was discriminating against women applicants in hiring. The court found that the small number of female faculty could be explained by factors other than a hiring bias.[35] However, in rank at hiring, the court found that the statistical evidence and the anecdotal evidence pointed to a policy of assignment of rank at hiring which was both uneven and unexplained. The findings showed disparity in the ranks assigned to men and women at instructor/assistant level and assistant/associate level not accounted for by criteria such as degrees held or prior experience. The finding of discrimination in setting rank at hiring also affected the setting of salary at hiring. The court acknowledged the acceptability of market value factors in arriving at salaries, but found no scheme using these factors in the setting of salary at hiring at URI. The statistical evidence and anecdotal evidence taken in light of a finding of discrimination in the setting of rank yielded a finding of discrimination in the setting of salary at hiring.[36] The court found no

33. 431 U.S. 324 (1977).
34. 606 F. Supp. at 1184.
35. *Id.* at 1197.
36. *Id.* at 1226.

discrimination in annual compensation, promotion, and the award of tenure.[37]

The court awarded back pay for the class of women based on a reassessment of their rank at hire, salary at hire, and salary increases for each subsequent year of pay, based on the formula used for increases each year. On the individual claims, they found that Kraynek was able to prove discrimination in pay, and that Roworth was able to show an impermissible denial of early tenure. Since this was a bifurcated process and damages were not addressed by the court here, litigation of these two claims for damages will proceed. Furthermore, attorney fees were awarded to those who had prevailed in their individual claims.

A number of cases raised the question of the court's authority to adjudicate a title VII claim. Issues ranged from questions of *res judicata* to state immunity claims. In one case involving *res judicata*, a minority employee lost his position with the county extension service. The employee alleged that his complaint about the discriminatory practices towards students, staff, and 4-H clubs precipitated his removal from his position. A state administrative judge found the plaintiff guilty on four charges and ordered him transferred to a new county rather than being dismissed. The plaintiff's title VII claim also included an injunction to prevent transfer until the title VII claim was litigated. The defendants, on appeal, argued that the federal district court lacked jurisdiction over a state administrative judge's decision and claimed that *res judicata* prevented relitigation in federal court. The Sixth Circuit ruled that a title VII claim was within the district court's jurisdiction and was not barred by previous litigation on state charges.[38]

In another case, the Seventh Circuit reversed and remanded a title VII case involving a white male painter who charged that the university had discriminated against him in hiring. The circuit court found that the district court had erred.[39] *Res judicata* did not apply where a state claim filed by the plaintiff had been dismissed. Furthermore, the state administrative judgment providing relief did not bar a title VII action in federal court.[40]

In another title VII case involving court jurisdiction, an appeal of

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37. *Id.* at 1242, 1253, 1266.

38. Elliott v. University of Tenn., 766 F.2d 982 (6th Cir. 1985).

39. Patzer v. Board of Regents of Univ. of Wis. Sys., 577 F. Supp. 1553 (W.D. Wis. 1984).

40. Patzer v. Board of Regents of Univ. of Wis. Sys., 763 F.2d 851 (7th Cir. 1985).

a summary judgment[41] had been transferred to a state agency. The state agency sent the complaint back to EEOC, stating it would not process the charge at that time. The circuit court noted that the intent of title VII was not to prevent double coverage by both state and federal statute, but rather to prevent concurrent adjudication. Under the "work-share" agreement between the state agency and EEOC, the state had in effect terminated ("halted") prosecution at the time of the filing of the complaint with the court, as stipulated by law.[42]

Several cases were dismissed because the damage claims could not be adjudicated in federal court. A title VII case involving claims for punitive damages and damages for pain and suffering was dismissed. Plaintiff based these claims on defendant's acts of removing her secretary and phone from her office prior to dismissal. The court ruled that title VII does not provide remedies for these employer actions.[43] In another case, plaintiff's attempt to attach breach of contract and tort claims to a title VII claim was dismissed because the state had immunity under the eleventh amendment from prosecution in federal court on state claims.[44]

Title VII litigation also involved complaints involving the nonrenewal of a contract or removal from a position for cause. In an Indiana case, a psychiatrist fired from her position because she refused to adjust her private practice schedule and meet her work obligations alleged a title VII violation. The district court had granted the defendant a summary judgment. The circuit court ruled that the establishment of a *prima facie* case did not prevent the lower court from granting a summary judgment if adequate nondiscriminatory reasons were provided by the defendant and if the plaintiff failed to show an issue of material fact which indicated that a pretext may have existed.[45]

In another case, a female brought a title VII charge of employment discrimination due to the institution's refusal to grant her part-time status and for firing her for holding down two jobs in violation of institutional policy. The institution had warned the plaintiff that she would be fired if she failed to relinquish her other full-time position. The plaintiff was able to substantiate that the president of the institution had stated that he saw no reason why a woman needed to hold down two jobs. The Eleventh Circuit remanded the case to the district

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41. Isaac v. Harvard Univ. 603 F. Supp. 22 (D. Mass. 1984).
42. Isaac v. Harvard Univ., 769 F.2d 817 (1st Cir. 1985).
43. Hooten v. Pennsylvania College of Optometry, 601 F. Supp. 1151 (E.D. Pa. 1984).
44. Hoferek v. University of Mo., 604 F. Supp. 938 (W.D. Mo. 1985).
45. Klein v. Trustees of Ind. Univ., 766 F.2d 275 (7th Cir. 1985).

court since the plaintiff was able to show that she was denied part-time employment status granted to males and that discriminatory statements were made by her employer.[46]

In the Eighth Circuit, the court upheld a lower court ruling. A female administrator charged both race and sex discrimination in a community college's action to remove her from an administrative position and place her in her former teaching position. At trial, the district court found that the plaintiff succeeded in establishing a *prima facie* case of discrimination, but the institution was able to substantiate nondiscriminatory reasons for its action.[47]

The hiring practices of colleges and universities were also at issue in title VII litigation. A hiring discrimination case with a complicated history was in the circuit court on appeal. Earlier, the circuit court found that the lower court had erred in ruling that the plaintiff was no longer a candidate for the position as a physician in the health center.[48] On remand, the district court found that, while the plaintiff was an active candidate for the position, the defendants had adequate reasons to believe that she was not a candidate and, therefore, hired someone who had equal or better qualifications. On appeal, the circuit court noted that, while the discriminatory allegations involved the most recent hiring by the health center, the plaintiff had been a candidate five times in which she was passed over for male applicants even though she had been told at least on one occasion that she was next on the list for hiring. The lower court had erred while the facts supported the defendant's knowledge that the plaintiff was an active candidate for the position. The circuit court found the plaintiff to be equally qualified but discriminated against due to her sex. Acknowledging her entitlement to appropriate relief, including hiring and backpay, the case was remanded to the district court.[49]

In another case, a university hired a Hispanic male over a white female for a position in the English department. The Hispanic was hired because the institution had a student population which was 80% Hispanic, but had no Hispanic faculty in the English department. The female filed sex discrimination charges under title VII, but did not file charges of discrimination based on national origin. The circuit court upheld a district court ruling that the plaintiff could not use discrimi-

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46. Thompkins v. Morris Brown College, 752 F.2d 558 (11th Cir. 1985).

47. Adolphe v. St. Louis Community College, 753 F.2d 687 (8th Cir. 1985).

48. Joshi v. Florida State Univ., 486 F. Supp. 86 (N.D. Fla. 1980), *aff'd in part, rev'd in part, and remanded*, 646 F.2d 981 (11th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).

49. Joshi v. Florida State Univ. Health Center, 763 F.2d 1227 (11th Cir. 1985).

nation based on national origin to establish a *prima facie* case of discrimination based on sex. The fact that she was a female played no role in the institution's hiring decision, and she had not filed charges on other grounds.[50]

In the Fifth Circuit, an institution's job requirement of a master's degree from an accredited library science program did not have a disparate impact on the plaintiff, a female, when 79% of the recipients of the degree were women. Furthermore, the plaintiff was not discriminated against by the refusal to recognize her master's degree in education as fulfilling the position requirements.[51]

A Florida case involved hiring practices under an affirmative action plan implemented by court order. The plan involved the use of a racial quota in hiring and stipulated that, if no minority candidates were in the final four reviewed for hiring, the person selected would be hired on a temporary basis and the position would be reopened. Plaintiff, hired on a temporary basis, applied for the reopened position and emerged as one of four candidates for the position. A minority candidate was hired, and the plaintiff filed suit under both title VII and the ADEA (age discrimination). The circuit court ruled that the court-ordered affirmative action plan using racial quotas was valid and "did not result in 'discharge' nor a trammelling of [plaintiff's] interests."[52]

Tenure awards were at issue in a number of title VII cases. In a Wisconsin case involving the denial of tenure, the plaintiff (a female) charged disparate treatment under title VII, based on sex. The court found that, even when comparing her with a similarly situated male, the promotion committee had nondiscriminatory reasons for its differential decision between the two candidates. The male candidate's peers in biology, through a unanimous vote to promote, had more confidence in his future promise, based on the quality of his publications and a recently acquired research grant. On the other hand, the female's peers in zoology had mixed assessments on the quality of her published works and future promise, which was reflected in a closely divided vote to promote. The evidence, according to the court, showed that her department anguished over its decision and that tenure decisions, while closely scrutinized by the court, must be in the hands of experts capable of making such judgments.[53]

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50. Lyford v. Schilling, 750 F.2d 1341 (5th Cir. 1985).

51. Merwine v. Board of Trustees for State Inst., 754 F.2d 631 (5th Cir. 1985).

52. Palmer v. District Bd. of Trustees of St. Petersburg Junior College, 748 F.2d 595, 601 (11th Cir. 1984).

53. Namenwirth v. Board of Regents of the Univ. of Wis. Sys., 769 F.2d 1235 (7th Cir. 1985).

In a limited ruling on a defense motion to grant a summary judgment on the portion of the plaintiff's charge seeking judicial relief in the award of tenure, the court did not want to rule out the possible award of tenure, since the nature of the alleged discrimination was yet to be established. If discrimination was found, the remedy would be determined by what would make the plaintiff whole again. Such a finding might result in a remand for a *de nova* evaluation of the tenure question or a court-ordered award of tenure.[54]

In a Virginia case, a minority female charged disparate treatment in the denial of an award of tenure. She alleged violations of title VII and due process. In reviewing her dossier under the appropriate tenure procedures, she was found to be deficient in scholarship—a nondiscriminatory reason she was unable to rebutt as pretextual.[55]

One case involved promotion, but is closely related to the tenure award cases. This Maryland case, on appeal, involved a black female who was rejected for a full professorship. An earlier decision rejected a motion to dismiss, but also ruled that the plaintiff was only entitled to back pay and reinstatement.[56] In this disparate treatment case, a *prima facie* case of discrimination based on race was established by the plaintiff. The university established three nonpretextual reasons for their refusal to promote the plaintiff. The reasons—her failure to provide a recommendation from a full professor outside the university, the limited quality and quantity of her publications, and her failure to receive unqualified approval of full professors in the department—were valid and nondiscriminatory. However, the court noted that the university's search and screen procedures, while not discriminatory, lacked the professional standards expected.[57]

The question of award of attorney fees was before the court as part of a title VII claim settled through a "Stipulation of Settlement." The court awarded a one-half reduction in the normal attorney fees to the plaintiff. They found that the agreement clearly allowed plaintiff to seek such fees and that the plaintiff could be viewed as a "prevailing party" in this case. The reduction in fees accounted for the plaintiff's partial success on the claims in the settlement.[58]

The question of tolling was again before the court in a number of cases. An Indian psychiatrist's failure to file a charge of discrimina-

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54. Pyo v. Stockton State College, 603 F. Supp. 1278 (D.N.J. 1985).

55. Siu v. Johnson, 748 F.2d 238 (4th Cir. 1984).

56. *See* The Yearbook of School Law 1985 at 310; McAdoo v. Toll, 591 F. Supp. 1399 (D. Md. 1984).

57. McAdoo v. Toll, 615 F. Supp. 1309 (D. Md. 1985).

58. Thomas v. Board of Trustees of Regional Community Colleges, 599 F. Supp. 331 (D. Conn. 1984).

tion for ten years was inexcusable and severely hampered the defendant's rights to mount a defense.[59] In Illinois, a move to dismiss a title VII claim on tolling grounds was successful, in part. The plaintiff was given thirty days to show that the state agency had terminated its action within the requisite time. Also, the court noted that the state laws' tolling provisions of 180 days did not apply to title VII. The court also rejected the plaintiff's argument that a series of separate hiring decisions constituted a continuous act of discrimination, meeting the tolling requirement counting from the last discriminatory incident. The court noted that, while several decisions may be viewed as continuous when the applicant did perceive the discrimination, the repeated denials, in this instance, were bold enough to have alerted the plaintiff earlier and should have resulted in the timely filing of charges.[60] A New York plaintiff filed a charge in 1977 for discriminatory acts which occurred in 1973, 1975, and, after the filing, in February 1977. The court ruled that the discriminatory acts of 1973 and 1975 were beyond the tolling requirements of title VII and that the complaint could not cover alleged discriminatory acts occurring after the filing of the complaint. Plaintiff must file a new claim for those acts.[61]

In a title VII case also involving equal pay, an emeritus professor filed suit in 1974 alleging discrimination under title VII and in 1976 under the EPA. In 1983, the circuit court awarded her damages back through 1977 on her equal pay claim, applying the three-year limitation based on the 1980 filing date.[62] The 1974 claim was previously remanded because the circuit court found that the trial court had erred in ruling that pre-Act evidence was inadmissible.[63] On remand, the plaintiff was able to use evidence back to 1947 to prove that she was treated differentially from similarly qualified male professors. The Eleventh Circuit affirmed the trial court ruling that she should receive compensation for the effects of sex discrimination in rank and salary since 1972, the year of the enactment of title VII.[64]

The Equal Pay Act. The issue of equity in pay involved questions of comparable work, discrimination in employee decisions, awards based on sex, and reverse discrimination.

In a case involving two professional groups, nurse practitioners challenged the higher pay received by physician assistants in a uni-

59. Pande v. Johns Hopkins Univ., 598 F. Supp. 1084 (D. Md. 1984).
60. Zewde v. Elgin Community College, 601 F. Supp. 1237 (N.D. Ill. 1984).
61. Zangrillo v. Fashion Inst. of Technology, 601 F. Supp. 1346 (S.D.N.Y. 1985).
62. Jepsen v. Florida Bd. of Regents, 710 F.2d 838 (11th Cir. 1983).
63. Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980).
64. Jepsen v. Florida Bd. of Regents, 754 F.2d 924 (11th Cir. 1985).

versity health center. The nurse practitioners argued that they possessed the training to perform the same functions as physician assistants but were not allowed to perform the tasks and were paid a different salary solely because they were females. The district court reviewed the training programs for both professionals and also heard testimony of faculty from the respective training programs and of practicing physicians. The court found that women were employed as physician assistants and that there was a clear distinction in the skills possessed by each profession, which justified the salary differential.[65]

In a Georgia case, the Eleventh Circuit affirmed several lower court decisions.[66] This case used a similar analysis to that used in the title VII class action case discussed above.[67] Using comparative data between similarly situated men and women within the same department and teaching similar courses, the lower court had found discrimination in the setting of rank at hiring and in salaries. While the institution claimed that differences were due to market value factors, they were unable to demonstrate how such a scheme had operated at the time of hiring or in the award of annual compensation. The court also upheld the district court's finding that the removal from a position of the husband of one of the plaintiffs was clearly in retaliation for filing suit.[68]

In a Massachusetts EPA case, the institution appealed a lower court finding of "willful violation of the Equal Pay Act"[69] based on the argument that the Fair Labor Standards Act did not cover educational institutions. The First Circuit Court rejected this argument, along with the institution's allegation that evidence of salaries of faculty hired prior to 1974 (the year of enactment of the Act) was inadmissible and should not have been included in EEOC's multiple regression analysis. The court also rejected the argument that ability, listed as one of the factors in the regulations, must be included, along with experience, training, and education, in order for the multiple regression to be valid under the law.[70]

A reverse discrimination case was appealed from the lower court.[71] The district court had found that the male plaintiff had been

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65. Beall v. Curtis, 603 F. Supp. 1563 (M.D. Ga. 1985).

66. *See* Marshall v. Georgia Southwestern College, 489 F. Supp. 1322 (M.D. Ga. 1980); Donovan v. Georgia Southwestern College, 580 F. Supp. 859 (M.D. Ga. 1984).

67. Chang v. University of R.I., 606 F. Supp. 1161 (D.R.I. 1985).

68. Brock v. Georgia Southwestern College, 765 F.2d 1026 (11th Cir. 1985).

69. EEOC v. McCarthy, 578 F. Supp. 45 (D. Mass. 1983).

70. EEOC v. McCarthy, 768 F.2d 1 (1st Cir. 1985).

71. *See* The Yearbook of School Law 1984 at 290, Ende v. Board of Regents of Regency Univs., 565 F. Supp. 501 (N.D. Ill. 1983).

discriminated against in the award of salary, but that such discrimination was allowable because of a previous administrative finding by EEOC of salary discrimination against women. The EEOC-ordered and implemented salary adjustment formula was the focus of this litigation. The Seventh Circuit, in affirming the lower court ruling, found that the evidence presented by the plaintiff only showed the existence of a *prima facie* case and not a clear violation. The institution clearly had a nondiscriminatory reason for the salary differential.[72]

Title IX. Only two cases were litigated using title IX. A female buildings and grounds employee brought suit alleging discrimination based on sex in her dismissal. Citing *North Haven v. Bell*,[73] the court found that the buildings and grounds department of the institution was not an educational program or activity within the meaning of title IX.[74]

A female Colorado plaintiff, removed from a physical education position for financial exigencies while two male teachers continued in the institution's employment, unsuccessfully raised a title IX claim.[75] The district court found that the physical education program was not a direct recipient of federal financial assistance, consistent with the ruling in *Grove City v. Bell*.[76] In another case, the defendant's motion to dismiss was denied and the parties were to address the issue of whether title IX permits an individual claimant the remedy of a cutoff of federal funds.[77]

Age Discrimination in Employment. In a Fifth Circuit age discrimination case, a supervisor had been inconsistent in his statements about why the employee had been dismissed. At trial, the jury chose to accept the supervisor's explanation of these inconsistencies and to find that the employee was removed for poor job performance. On appeal, the Fifth Circuit Court found no evidence to refute the jury's conclusion and affirmed the decision.[78]

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72. Ende v. Board of Regents of Regency Univs., 757 F.2d 176 (7th Cir. 1985).
73. *See* The Yearbook of School Law 1983 at 294, 456 U.S. 512 (1982).
74. Walters v. President and Fellows of Harvard College, 601 F. Supp. 867 (D. Mass. 1985).
75. Mabry v. State Bd. for Community Colleges, 597 F. Supp. 1235 (D. Colo. 1984).
76. *See* The Yearbook of School Law 1985 at 312, 104 S. Ct. 1211 (1984).
77. Storey v. Board of Regents of Univ. of Wis. Sys., 600 F. Supp. 838 (W.D. Wis. 1985).
78. Lewis v. Millsaps College, 759 F.2d 1239 (5th Cir. 1985).

In another age discrimination case, the plaintiff was passed over for a promotion. The district court found that age discrimination was present and awarded the university a summary judgment, based on errors at trial.[79] The circuit court, reversing, found no error at trial. Additionally, the court noted that, while no specific evidence proved age discrimination, a jury viewing evidence collectively could reasonably reach that finding. The case was remanded for a determination of a damage award.[80]

A New York court found that removal for budgetary constraints was a legitimate reason and that the plaintiff had failed to establish discrimination based on age.[81] The Sixth Circuit affirmed in part a district court decision,[82] where a plaintiff was removed as department head due to discrimination based on age. However, the circuit court reversed in part, finding error by the lower court in not allowing the plaintiff the opportunity to establish an alleged property interest in the position and, therefore, pursue a claim of denial of due process.[83]

Rehabilitation Act of 1973. Several cases involving discrimination based on a person's handicap were before the courts. The federal district court dismissed a complaint, under the Rehabilitation Act of 1973, against the secretary of education for failure to investigate charges against an institution.[84] The plaintiff alleged that the institution failed to adjust its academic program to accommodate the plaintiff's handicap—a learning disability. The court ruled that a private right of action does not exist under the handicapped law.

Several cases are included here because of the subject matter. They actually involve state law, as opposed to the federal act. In New York, a disabled grounds keeper, removed for budgetary reasons, filed suit under New York's Rehabilitation Act. The court found a nondiscriminatory reason for removal.[85] In Illinois, an individual accepted for a position was eventually not hired because the applicant, an amputee below one knee, was ruled physically unfit to be employed as a painter for the institution's grounds department. The Illinois Court of Appeals found that the plaintiff was not given an adequate opportun-

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79. *See* The Yearbook of School Law 1984 at 291, EEOC v. University of Okla., 554 F. Supp. 735 (W.D. Okla. 1982).

80. EEOC v. University of Okla., 774 F.2d 999 (10th Cir. 1985).

81. Baranowski v. Cornell Univ., 484 N.Y.S.2d 202 (N.Y. App. Div. 1984).

82. *See* The Yearbook of School Law 1985 at 315, McLaurin v. Fischer, 595 F. Supp. 318 (S.D. Ohio 1983).

83. McLaurin v. Fischer, 768 F.2d 98 (6th Cir. 1985).

84. Salvador v. Bell, 622 F. Supp. 438 (N.D. Ill. 1985).

85. Guilfoose v. New York State Agriculture Experiment Station, 488 N.Y.S.2d 491 (N.Y. App. Div. 1985).

ity to substantiate his ability to perform the tasks. The institution based its rationale solely on the existence of the handicap, not on whether he was an otherwise-qualified handicapped individual, resulting in a violation of the state's Fair Employment Practices Act.[86]

Hiring Discrimination. In a hiring discrimination case, a Washington court found that an institution's attempt to alleviate underrepresentation by women did not result in discrimination against a male applicant.[87] In a New York case, the court found that a faculty member was not denied the position as chair of the accounting department because of his arrest and acquittal for a crime, but rather based on his qualifications.[88]

A Rhode Island hiring dispute, before the court earlier over a consent decree,[89] was decided on the merits. The plaintiff had been selected as third on a short list of candidates, but lacked the qualifications of the other two. The committee made a decision not to hire the plaintiff after the first two on the list refused the endowed chair. The committee decided to search for a candidate whose qualifications would be evaluated at the "senior level" (full professor). The district court found that the defendant institution had provided nondiscriminatory reasons for not hiring the plaintiff, who had failed to establish a *prima facie* case of discrimination.[90]

A related case involved licensure. An individual was unable to support claims of a violation of equal protection and an arbitrary and capricious decision by the Minnesota Board of Psychology.[91] The board refused his license application as a consulting psychologist because his doctoral degree was from an institution lacking accreditation.

Nontenured Faculty

Issues surrounding nontenured faculty continue to be litigated. While the first amendment issues included in this section are not exclusive to nontenured faculty, they are demonstrative of the kinds of problems faced in this constitutional area. Part-time faculty rights continue to come before the courts in large numbers.

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86. Board of Trustees of Univ. of Ill. v. Human Rights Comm'n, 485 N.E.2d 33 (Ill. App. Ct. 1985).

87. Stahl v. University of Wash., 691 P.2d 972 (Wash. Ct. App. 1984).

88. Lebensbaum v. Adelphi Univ., 489 N.Y.S.2d 601 (N.Y. App. Div. 1985).

89. *See* The Yearbook of School Law 1983 at 296, Lamphere v. Brown Univ., 685 F.2d 743 (1st Cir. 1982).

90. Lamphere v. Brown Univ., 613 F. Supp. 971 (D.R.I. 1985).

91. Draganosky v. Minnesota Bd. of Psychology, 367 N.W.2d 521 (Minn. 1985).

First Amendment Freedom of Speech. In an Illinois case, an art faculty member refused to remove his art work from an exhibit in the main mall of the college because it depicted explicit sexual acts. The college had offered to move the art work to another room located away from the main traffic areas of the college and solicited the faculty member's proposal as to the new location. The Seventh Circuit found that the decision as to where within a public forum to display sexually explicit art was less menacing and did not infringe on the first amendment rights of the plaintiff.[92]

In a highly publicized controversy over the selection of a department head, a first amendment case surfaced. The case involved a Marxist political science professor's slander suit against the syndicated columnists Evans and Novak. In a column in the *Washington Post*, they interpreted the professor's writings as indicating that he used his "classroom as an instrument for preparing what he called the revolution." The column appeared after it was announced that the professor had accepted an appointment at the University of Maryland. The District of Columbia Circuit Court found that the expression of opinion was a protected right. The fact that the column was written on the opinion page of the paper and that the article, in its content, clearly did not misrepresent fact, but rather was stating opinion, did not support a finding of defamation.[93]

Nonrenewal Procedures. Nontenured faculty members filed suit when their contracts were not renewed. The controversies concerned charges of discrimination, the existence of a property right, and breach of contract. This section concludes with several unsuccessful claims involving denials of tenure.

The lead case in this section involves the issue of access to confidential information gathered for the tenure review process.[94] Involved was the disclosure of confidential peer review materials. The faculty member, of French origin, was denied tenure, allegedly on the basis of national origin. The EEOC asked not only for confidential information on the plaintiff's nontenure decision, but also for information on other tenure decisions made from 1977 to the present. The institution maintained that such information should not be provided unless fact and circumstances indicate that some impermissible consideration figured in the decision. The Third Circuit Court rejected the Seventh

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92. Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 528 (1985).

93. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984).

94. EEOC v. Franklin and Marshall College, 775 F.2d 110, 114 (3d Cir. 1985).

Circuit[95] and the Second Circuit[96] recognition of a qualified academic privilege and agreed with a prior Fifth Circuit decision.[97] The ruling stated that the institution should be compelled to provide the documentation to EEOC under a court-monitored guarantee of the confidentiality of personnel records.

Nonrenewal cases also raised the question of the existence of a property interest or a liberty interest. In a Texas case, a nontenured faculty member's contract was not renewed. The federal district court found that the plaintiff was not tenured and that her expectation of obtaining tenure status because she was awarded tenure at another institution did not give her a property right. Furthermore, refusal of tenure did not result in a stigma, implicating a liberty interest, and tenure at another institution did not mean that the defendant institution had acted in an arbitrary and capricious manner in refusing tenure.[98]

However, in New Jersey the Third Circuit Court remanded the case of three nontenured faculty members for a determination of whether a property right existed based on state laws governing the contract between the faculty and the institution. The court found that the district court had erred in giving "preclusive effect" to a state court decision which found that the sole remedy was arbitration under the collective bargaining agreement without addressing the question of due process.[99]

In a Texas case, a faculty member charged defamation resulting from a letter sent to the tenure review committee by two faculty members. The Texas Court of Appeals found that an affidavit filed with the court, stating that the defendant faculty members believed the information to be true, was not sufficient to allow a lower court to grant a summary judgment. An issue of fact exists as to the credibility of the defendants, which must be decided at trial.[100] In several cases, the plaintiffs, who were denied tenure, failed to show the existence of either a liberty or property interest or to substantiate a claim of discrimination.[101]

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95. *See* The Yearbook of School Law 1984 at 282, EEOC v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983).

96. *See* The Yearbook of School Law 1983 at 305, Gray v. Board of Higher Educ., CUNY, 692 F.2d 901 (2d Cir. 1982).

97. *See* The Yearbook of School Law 1982 at 264, *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982).

98. LaVerne v. University of Tex. Sys., 611 F. Supp. 66 (S.D. Tex. 1985).

99. Kovats v. Rutgers, 749 F.2d 1041 (3d Cir. 1984).

100. Goodman v. Gallerano, 695 S.W.2d 286 (Tex. Civ. App. 1985).

101. *See* Amoss v. University of Wash., 700 P.2d 350 (Wash. Ct. App. 1985); Batla v. North Dakota State Univ., 370 N.W.2d 554 (N.D. 1985); Chen v. Wharton, 492

Several nonrenewal cases alleged the possession of tenure because of the institution's actions or inactions. In Louisiana, a faculty member was denied tenure but awarded a contract for one more year. The court rejected the plaintiff's allegation that the award of a contract for five consecutive years meant that the person has been awarded automatic tenure under institutional policy.[102] In Illinois, a faculty member's acceptance of a new contract at a lower rate precluded his right to bring a claim under the old contract.[103]

Cases involving failure of the institution to give timely notice of nonrenewal also were litigated. A Michigan plaintiff was able to get a case remanded on appeal because the board of trustees had failed to vote on his termination, as required by statute.[104] However, in Mississippi a plaintiff's demand for damages because the institution failed to give timely notice of nonrenewal was unsuccessful.[105] In a North Dakota case, a faculty member was successful in getting the state supreme court to remand his case because questions of fact in regard to employment at different ranks raised an issue regarding the institution's failure to review the plaintiff for tenure.[106] In an Iowa case, the plaintiff was able to get the case remanded for consideration of the question of whether he should have been granted tenure in December 1980.[107] A District of Columbia case was remanded because the plaintiff established a *prima facie* case of sex discrimination. However, the court ruled that the trial court had erred, awarding the plaintiff tenure based on the untimely notice of nonrenewal, since the contract was ambiguous on this point.[108]

One renewal case raised the issue of a breach of contract. The department chair notified the plaintiff verbally and in writing that the department would be unable to offer him a position during the second year of his contract and sought his resignation. After the plain-

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N.Y.S.2d 494 (N.Y. App. Div. 1985); Kumar v. Board of Trustees, Univ. of Mass., 774 F.2d 1 (1st Cir. 1985); O'Connor v. Peru State College, 605 F. Supp. 753 (D. Neb. 1985); Sabet v. East Va. Medical Auth., 611 F. Supp. 388 (E.D. Va. 1985), *affirmed*, 775 F.2d 1266 (4th Cir. 1985); Staheli v. University of Miss., 621 F. Supp. 449 (N.D. Miss. 1985); Stensrud v. Mayville State College, 368 N.W.2d 519 (N.D. 1985).

102. Ford v. Stone, 464 So. 2d 380 (La. Ct. App. 1985); summary judgment to institution on a first amendment claim was granted at 599 F. Supp. 693 (M.D. La. 1984).

103. Davison v. Board of Trustees of C. Sandburg College, 478 N.E.2d 3 (Ill. App. Ct. 1985).

104. Blanchard v. Lansing Community College, 370 N.W.2d 23 (Mich. Ct. App. 1985).

105. Robinson v. Board of Trustees of E. Cent. Junior College, 477 So. 2d 1352 (Miss. 1985).

106. Brown v. North Dakota State Univ., 372 N.W.2d 879 (N.D. 1985).

107. Black v. University of Iowa, 362 N.W.2d 459 (Iowa 1985).

108. Howard Univ. v. Best, 484 A.2d 958 (D.C. 1985).

tiff acquired the services of an attorney, the institution notified him that it would honor the second year of his contract. Investigating other job possibilities did not change plaintiff's position in relation to the institution, and the institution's retraction nullified the breach of contract.[109]

In the final case in this section, a state court granted summary judgment to the institution because the plaintiff's charge of defamation relied on statements of which he was aware eight years earlier, making the claim time barred.[110]

Part-time Faculty. Issues surrounding the employment and rights of part-time faculty were again in the courts. A doctoral student who also was a teaching assistant became embroiled in a controversy over the content of a government course she was teaching. Complaints had been brought forward by several students. During an investigation, it was discovered that the government department was in violation of university policy in allowing teaching assistants to develop their own course syllabi rather than using syllabi approved by the departmental faculty. A new department head reassigned the plaintiff to a nonteaching assistantship. The plaintiff brought charges of constitutional violations since reassignment was alleged to be based on political pronouncements made in the classroom. The court found that reassignment was made for legitimate reasons other than plaintiff's pronouncements (i.e., her unwillingness to teach the course with a department-approved syllabus). Additionally, the court ruled that the plaintiff had no property interest mandating due process before reassignment. Even though the plaintiff had not raised the liberty interest question, the court chose to reject any claims since no charges were ever made public. The lower court judgment was affirmed.[111]

Another case involved a part-time employee who taught a 60% course load one semester, but had a 40% load during the remainder of his employment. However, the plaintiff also was employed full-time as a tutor in another program on campus. Plaintiff alleged that, since his total work assignment was over 60% when both positions were considered, he should have been awarded tenure since he met the minimum requirement of at least two consecutive years of employment in a 60% teaching assignment. The state court of appeals reversed the lower court's finding that the plaintiff should have been awarded tenure. The appeals court ruled that the tutorial position was not a teach-

109. Lowe v. Beaty, 485 A.2d 1255 (Vt. 1984).
110. Dominguez v. Babcock, 696 P.2d 338 (Colo. Ct. App. 1984).
111. Kelleher v. Flawn, 761 F.2d 1079 (5th Cir. 1985).

ing position within the statutory scheme controlling the award of tenure.[112]

Tenured Faculty

The court litigated a number of cases involving tenured faculty. Sexual harassment of students was again before the court this year. Other issues included first amendment violations and denial of employee privileges.

Termination for Cause. Litigation in this section involved several areas. One type of case posits whether a tenured faculty member's first amendment rights were violated through termination. A second type of case involves moral turpitude and sexual harassment of students. A third type of case involves termination for incompetence. The final type of case deals with highly irregular institutional procedures. The opening cases in this section appropriately involved the question of who was qualified to hold a tenured appointment. A laboratory instructor, dismissed without a hearing, sued. She had held the position for more than three years, the required time period for tenure. She alleged that her due process rights had been violated in her dismissal from a tenured position. The Seventh Circuit Court found that the definition of her full-time position, in "academic support services" with the main responsibility of teaching, fit the definition of faculty qualified for tenure as defined by state statute. The plaintiff was entitled to due process, and the case was remanded.[113] In a second case, a tenured faculty member at a two-year branch campus of a major university, alleging the possession of tenure within the system, demanded reassignment to the main campus. In 1977, after the plaintiff was hired, the institution had changed its policy so that tenure was awarded only on the campus of a faculty member's employment. A suit brought in 1985 was time barred since, as defined by the statute of limitations, it could only be brought within one year after the date of enactment.[114]

Several cases of termination of a tenured faculty member involved alleged violations of first amendment freedom of speech rights. In a long drawn out case involving Lincoln University, a predominantly

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112. McGuire v. Governing Bd. of San Diego Community College Dist., 208 Cal. Rptr. 260 (Cal. Ct. App. 1984).

113. Dauel v. Board of Trustees of Elgin Community College, 768 F.2d 128 (7th Cir. 1985).

114. Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985).

black institution in Pennsylvania, a key plaintiff in a previous litigation[115] was dismissed for cause. The Third Circuit found that the lower court had erred in granting summary judgment to the defendant institution. The plaintiff's conflicts with colleagues in his department and his pronouncements about academic standards and grade inflation were matters of public concern and not simply pronouncements within the work place, not covered by the first amendment. The case was remanded to the district court.[116] In a similar case, where removal was based on derogatory statements made about the faculty member's chair and a list of twenty other allegations, the Eleventh Circuit remanded the case to the district court. The appeals court found that the district court correctly noted that one of the charges involved first amendment-protected pronouncements, but erred in stating that thirteen other charges not covered by the first amendment would yield dismissal when the substantiation of the charges was never reviewed. The court also noted that an issue of fact existed as to the adequacy of the due process procedures followed by the institution.[117] In a third first amendment case, a tenured faculty member was dismissed for shutting down some university activities and interfering with a police order to disperse during a protest over the war in Vietnam. The plaintiff alleged that his first amendment rights were violated since he was dismissed for protected speech. Citing numerous Supreme Court decisions, a California court ruled that his disruption of university activities and interference with police attempts to regain order were not constitutionally protected, but violated the basic tenets of academic freedom so important to the maintenance of an intellectual community.[118] In the final case involving first amendment rights in termination for cause, a faculty member was removed for neglecting his professional duties. The plaintiff became embroiled in a controversy with a black student in his class. At a predominantly black institution, the faculty member complained about the skills of students in his class and told a story about monkeys, which generated a verbal retort from a student who called him a racist. The faculty member refused to teach his class until the student apologized and the student refused. Although the matter was referred to the administration, no effort was made to intercede and resolve the matter. The faculty member re-

115. *See* Trotman v. Board of Trustees of Lincoln Univ., 635 F.2d 216 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981).

116. Johnson v. Lincoln Univ. of the Commonwealth Sys. of Higher Educ., 776 F.2d 443 (3d Cir. 1985).

117. Harden v. Adams, 760 F.2d 1158 (11th Cir. 1985).

118. Franklin v. Leland Stanford Junior Univ., 218 Cal. Rptr. 228 (Cal. Ct. App. 1985).

mained adamant about resumption of teaching in the class. Charges eventually were brought against the faculty member and a grievance committee found him guilty of neglect of duty. He was subsequently removed. The federal district court awarded a summary judgment to the defendant institution, finding that no right had been violated in the institution's action against the employee.[119]

A number of terminations for cause involved sexual activity or harassment. In an Oklahoma case, a male faculty member was arrested and convicted of soliciting sexual activity in a student union restroom. The institution, after conducting appropriate hearings, dismissed the professor on the grounds of moral turpitude. The plaintiff argued that under the AAUP standards the institution should only review how this activity would interfere with the faculty member's teaching capabilities. The court rejected this argument as specious at best.[120] In another case involving a faculty member's sexual advances to females, the Fifth Circuit Court affirmed a district court decision awarding a summary judgment to the institution on the constitutional questions of due process and the question of prejudice of two members of the faculty review committee.[121] In a third case involving sexual harassment, the court ruled that two of the incidents of sexual harassment were time barred and the remaining charge did not support a finding of "a pattern or practice" of harassment as alleged by the institution. A California court stated that the excuse that the victims would not cooperate at the time of the two earlier incidents was not supported by the fact that the victims now had come forward to testify. The court directed the lower court to order the faculty member reinstated.[122]

A number of terminations for cause involved allegations of poor performance on the job. In one case, a tenured faculty member was removed as an oboeist in the Woodwind Arts Quintet, a group he organized and played in as part of his original contract with the institution. Plaintiff was able to establish material facts sufficient to reject a summary judgment motion by the defendants, since his original contract had a clause referring to performance in the woodwind group. He also was able to show a liberty interest, since testimony indicated serious impairment of the plaintiff's performing opportunities due to

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119. McConnel v. Howard Univ., 621 F. Supp. 327 (D.D.C. 1985).

120. Cornvet v. Boger, 757 F.2d 223 (10th Cir. 1985).

121. Levitt v. University of Tex. at El Paso, 759 F.2d 1224 (5th Cir. 1985). *See* The Yearbook of School Law 1985 at 321, Levitt v. Monroe, 590 F. Supp. 902 (W.D. Tex. 1984).

122. Brown v. California State Personnel Bd., 213 Cal. Rptr. 53 (Cal. Ct. App. 1985).

the stigma of the removal action and the fact that it was common knowledge among members of the performing community. The case was remanded for a determination as to whether a property interest existed and the order for a name-clearing hearing was affirmed.[123] In a Minnesota case, the Eighth Circuit Court affirmed a lower court decision.[124] The district court had found that the plaintiff, removed for a record of poor teaching, advising, and meeting job responsibilities, was not denied due process or removed for discriminatory reasons based on his race. In an Illinois case, a professor with questionable teaching performance was given another contract commencing in December 1978 with the opportunity to improve his teaching with the aid of a faculty committee. In December 1979, based on reports of no improvement, he was notified that his contract would not be renewed when it expired in December 1980. The court ruled that the plaintiff did not come under the provisions of a new act giving faculty tenure, since he was not a faculty member in good standing with the institution on the date the law took effect.[125] In the last case involving incompetence, the plaintiff was not deprived of any rights by being required at a hearing to perform a number of chemistry experiments.[126]

An unusual case involved irregular activities by an institution in the termination of a tenured faculty member. The institution relied on a phone message given to a secretary and not on its normal procedure of written notification from the faculty member where a resignation is concerned. The phone message, which the faculty member denies ever giving, appeared to the court to be an opportunity of which the institution attempted to take advantage.[127]

In the final case in this section, a faculty member was moved from one department to another because of conflicts within the first department. The courses taught were similar and within the plaintiff's area of expertise. Plaintiff, at the time of unsuccessful state litigation, chose not to pursue a federal claim and could not raise it later in federal court.[128]

Denial of Employee Privileges. Several cases involved the earnings of full-time faculty engaged in private practice in university

123. Kramer v. Horton, 371 N.W.2d 801 (Wis. Ct. App. 1985).

124. King v. University of Minn., 774 F.2d 224 (8th Cir. 1985). *See* King v. University of Minn., 587 F. Supp. 902 (D. Minn. 1984).

125. Fleischer v. Board of Community College Dist. No. 519, 471 N.E.2d 215 (Ill. Ct. App. 1985).

126. Bevli v. Brisco, 212 Cal. Rptr. 36 (Cal. Ct. App. 1985).

127. Mahoney v. Board of Trustees of San Diego Community College Dist., 214 Cal. Rptr. 370 (Cal. Ct. App. 1985).

128. Stitzer v. University of P. R., 617 F. Supp. 1246 (D.P.R. 1985).

facilities. A university medical school sought recovery of business records of a physician's private practice conducted as part of his tenured position at the university. The court found that it was legal for the institution and the doctor to share equally in the profits from his practice conducted at the institution and that the records were the property of the university.[129] In another case, the faculty member sought injunctive relief from the institution's decision to limit the amount of money a tenured faculty member of the medical college can earn in private practice. The court found that the plaintiff's claims to constitutional protections, such as associational rights, a property interest, and a liberty interest protecting his private practice earnings, were far-fetched at best.[130]

The final cases of this section involved benefits accrued from tenure other than a property right. A faculty member alleged that tenure included the responsibility of the institution to provide him with adequate research facilities, teaching assignments, and nondiscriminatory treatment. The suit stems from a decision to relocate plaintiff's office, which he alleged was one of a number of incidents designed to undermine his career. The court found that the plaintiff was unable to establish a cause of action for a breach of contract or tort.[131] In a Pennsylvania case, the plaintiff was unable to substantiate a charge of discrimination based on sex in the denial of promotion to full professor.[132]

Termination Due to Financial Exigency or Program Elimination. Several cases involved either removal or reclassification to a part-time position due to a financial exigency. In an Alabama case, the court found that it was within the president's authority to reduce salaries as a result of monetary reductions and enrollment declines. When the plaintiff's employment was reinstated, he was entitled to the reduced salary, not a salary at the previous scale.[133]

In a West Virginia case, the court found that the plaintiff, an employee removed due to a financial exigency, held the right to first refusal on a position for which she was qualified. The institution's president had a responsibility to give her that right as soon as he was aware of a resignation and the existence of an unfilled position. The date of the resignation resulting in the vacancy.[134] In a Tennessee case,

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129. Albany Medical College v. McShane, 481 N.Y.S.2d 917 (N.Y. App. Div. 1984).
130. Adamsons v. Wharton, 771 F.2d 41 (2d Cir. 1985).
131. Gertler v. Goodgold, 487 N.Y.S.2d 565 (N.Y. App. Div. 1985).
132. Molthan v. Temple Univ., 778 F.2d 955 (3d Cir. 1985).
133. Davis v. Owen, 461 So. 2d 1300 (Ala. 1984).
134. Hooper v. Jensen, 328 S.E.2d 519 (W. Va. 1985).

the court ruled that a tenured administrator could be removed as a result of budget cuts which eliminated his position. Furthermore, the institution could retain nontenured employees while removing a tenured employee.[135]

In a North Dakota case, a faculty member was reclassified from a full-time tenured position to a part-time position due to a decrease in enrollments. During verbal communications concerning the employee's contract, it was alleged that the employee had asked for the part-time position because it would be advantageous in his pending divorce settlement. The trial court decision was affirmed, since, on appeal, the court found adequate evidence that indicated that the plaintiff was offered and rejected a full-time appointment in favor of the part-time appointment, removing any due process obligation required of the institution.[136]

The final case was a motion for a summary judgment by the defendant institution. However, because there was so much confusion surrounding the plaintiff's employment status prior to his reclassification as a part-time employee, the summary judgment was denied and the matter will be litigated.[137]

Denial of Employee Benefits. Cases concerning the denial of other employee benefits included litigation over the award of unemployment compensation, retirement benefits, and the ownership of records of a faculty member's private practice conducted on university property.

A number of cases concerned the issue of whether a dismissed employee was entitled to unemployment compensation. In an Oregon case, the Employment Appeals Board could not reverse the finding of the referee based on *ex parte* testimony without communicating that testimony to all parties involved. Failure to communicate required the court to reverse and remand the case. On remand, the burden will be on the plaintiff to prove that he left his job for a good reason.[138] In a South Carolina case, the institution was not liable for part of the unemployment compensation mistakenly paid to the former employee absent notification of the claim with the employer prior to payment.[139] In another Oregon case, an instructor whose full-time position was

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135. Smith v. State Technical Inst. of Memphis, 682 S.W.2d 915 (Tenn. 1984).
136. Wastvedt v. State, 371 N.W.2d 330 (N.D. 1985).
137. Cabarga-Cruz v. Fundacion Educativa Ana G. Mendez, Inc., 609 F. Supp. 1207 (D.PR. 1985).
138. Turnquist v. Employment Div., 694 P.2d 1021 (Or. Ct. App. 1985).
139. Newberry College v. South Carolina Employment Sec. Comm'n, 333 S.E.2d 58 (S.C. Ct. App. 1985).

terminated was not precluded from receiving unemployment compensation because he had accepted a part-time position in the fall.[140]

A fringe benefit case involved a plaintiff 's eligibility for workmen's compensation after she had resigned from her position and later returned for a short period to train her replacement. The court, denying compensation, ruled that, since she had voluntarily resigned her position, the time of temporary employment did not change her status under the state's unemployment compensation laws.[141] A Minnesota former employee, removed from his position but still receiving his salary and fringe benefits for the final year of his contract, was not entitled to unemployment compensation.[142]

A series of cases involved retirement benefits. In a California case, a group of teachers, who were time barred from adjudicating salary claims based on their reclassification as permanent employees, were not barred from adjustments to their retirement benefits based on the salaries they should have received. The statute of limitations would not begin counting until the day the retirement benefits are payable.[143] In Florida, it was inappropriate for the retirement system to use the date of original membership to accrue interest rather than the date plaintiff returned from maternity leave, when she had withdrawn all funds from the system at the time of the leave.[144] In Pennsylvania, a faculty member was not allowed to purchase credit in two state retirement systems for public and state education employees because she worked at a state-related but private institution.[145] The Pennsylvania retirement system could not be compelled to honor a contract between the Department of Education and a former president, giving him the opportunity to pay into the state retirement system, when the system was not allowed to make such arrangements by statute.[146] On the issue of federal tax, the federal district court ruled that money received by the plaintiff as a survivor's insurance benefit under the university's retirement program was exempt from classification as income under the Internal Revenue Code.[147]

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140. Kelly v. Employment Div., 701 P.2d 448 (Or. Ct. App. 1985).

141. *In re* Kindlon, 494 N.Y.S.2d 830 (N.Y. App. Div. 1985).

142. Martinson v. University of Minn., 370 N.W.2d 462 (Minn. Ct. App. 1985).

143. California Teachers Ass'n v. Governing Bd. of the Yosemite Community College Dist., 214 Cal. Rptr. 777 (Cal. Ct. App. 1985).

144. Fiorentino v. Department of Admin., Div. of Retirement, 463 So. 2d 338 (Fla. Dist. Ct. App. 1985).

145. Trotz v. Pennsylvania State Employees' Retirement Bd., 495 A.2d 650 (Pa. Commw. Ct. 1985).

146. Watrel v. Pennsylvania Dep't of Educ., 488 A.2d 378 (Pa. Commw. Ct. 1985).

147. Barnes v. United States, 611 F. Supp. 413 (C.D. Ill. 1985).

This section closes with a case involving a wife's attempt to get part of her husband's salary withheld, based on a judgment in matrimonial court. The court ruled that withholding amounts from the paycheck which were part of the judgment against the husband was an appropriate practice.[148]

Administration and Staff

A number of cases involving administrative personnel have been litigated this year. Several categories of cases include nonrenewal of a contract and termination for cause.

One case was an appeal of a case reported last year.[149] A president alleged that he possessed a property interest requiring a hearing prior to removal by the board. The court ordered the board, in compliance with the state administrative code, to provide the specific reasons for denial of an appeal. Subsequently, the board denied the petition and, in a letter to the plaintiff, stated six reasons for the denial. On appeal, the court again affirmed the board's action.[150]

In a Pennsylvania case, the plaintiff complained about the way his superiors managed the Instruction Services Division at a public institution. He alleged that his dismissal was the result of his pronouncements on matters of public policy, since he was making recommendations on how to save the state taxpayers money. The court found that, under common law, the employee could be dismissed at will and that the plaintiff's pronouncements did not concern public policy, but rather were differences of opinion on how to manage the division. The defendant institution may dismiss an employee who becomes troublesome or hostile to his superiors.[151] In a related case, the procedures followed in the suspension of an employee for three days did not violate the due process and equal protection rights of the plaintiff.[152]

Several cases dealt with the contract provisions involving notification of nonrenewal of an employee contract. In one case, an employee was not notified within the 120-day required time period for notification of the nonrenewal of her contract. A court ordered her reinstated

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148. Kahn v. Trustees of Columbia Univ., 492 N.Y.S.2d 33 (N.Y. App. Div. 1985).

149. *See* The Yearbook of School Law 1985 at 331, Sims v. Board of Trustees of N. Fla. Junior College, 444 So. 2d 1115 (Fla. Dist. Ct. App. 1984).

150. Sims v. Board of Trustees of N. Fla. Junior College, 473 So. 2d 1 (Fla. Dist. Ct. App. 1985).

151. Rossi v. Pennsylvania State Univ., 489 A.2d 828 (Pa. Super. Ct. 1985).

152. Petersen v. Board of Regents of the Regency Univ. Sys., 623 F. Supp. 235 (N.D. Ill. 1985).

with back pay and benefits.[153] A California case reached a similar result, with the rationale that a timely notification was the minimal due process required for employees serving at the will of the employer.[154] A New York court found that the employee had no property right, since the president's verbal statements about continuous employment at the time of hiring were not incorporated into the contract.[155]

A number of cases concerned the issue of removal of administrators for cause. Probably one of the more interesting cases involved a nurse anesthetist at a university medical center. She refused to administer certain drugs to a patient, as ordered by the physician who subsequently administered the drugs. The patient died, and his estate sued the doctor for malpractice. Prior to giving a deposition and testifying at the trial, the nurse was threatened and told not to divulge what had transpired. She gave an accurate testimony, resulting in award of damages to the deceased's estate. Subsequent to the trial, she was harassed and eventually dismissed. The court found that the dismissal after eleven years of outstanding service was not supported by adequate reasons. Also, the plaintiff had raised an enforceable claim that she was dismissed for her refusal to give false testimony, and the lower court decision was reversed and remanded.[156]

In another dismissal for cause, the plaintiff had agreed to resign if the university would not place any derogatory information in his personnel file. A statement in an annual report that he "had been terminated" was not viewed by the court as derogatory, nor was it a part of his personnel file.[157]

An allegation of due process rights in dismissal closes this section. An Alabama plaintiff had been given a hearing on a charge of acts of insubordination. On review of the hearing committee's report, the president considered information in the personnel file and a memo from the personnel director. This information was not presented at the hearing, thus denying plaintiff the opportunity to mount a defense. The court ruled that his due process rights had been violated and ordered the institution to reconsider his dismissal. More than nominal damages could not be determined until after the court-ordered hearing.[158]

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153. Dennis v. Dobbs, 474 So. 2d 77 (Ala. 1985).
154. Harris v. State Personnel Bd., 216 Cal. Rptr. 274 (Cal. Ct. App. 1985).
155. Bykofsky v. Hess, 484 N.Y.S.2d 839 (N.Y. App. Div. 1985).
156. Sides v. Duke Hosp., 328 S.E.2d 818 (N.C. Ct. App. 1985).
157. Elias v. Youngken, 493 A.2d 158 (R.I. 1985).
158. Davis v. Alabama State Univ., 613 F. Supp. 134 (M.D. Ala. 1985).

Collective Bargaining

The section on collective bargaining continues to include litigation in a number of areas. Cases involving the issue of whether faculty are employees or managers continue to work their way through the courts. Other litigation included questions of dues refunds to nonmembers for money used for political activity, waivers of rights in the collective bargaining agreement, unfair labor practices, and the authority and scope of arbitration procedures.

The lead case for this section follows the *Yeshiva*[159] decision. The court found that the Lewis University faculty were managers, not employees.[160] The court noted that the full-time faculty of the College of Arts and Sciences at Lewis University "have substantial control of the formulation and implementation of educational policies within the college."[161] Faculty determine admission policies, grading criteria, course offerings, calender, and faculty promotion, tenure, and hiring.

A related issue involving the authority of the NLRB over private church-related institutions also was before the First Circuit.[162] The court held that the NLRB ruling requiring private church-related institutions to bargain with the employee's bargaining unit did not violate the establishment clause or the free exercise clause of the first amendment.

A New York case raised the question of the refund policy to nonunion members of that portion of the union dues used for political activities. A professor brought a claim of unfair practice over the amount of the refund he received from his agency shop dues. State law required that the portion of the fee used for political activities be refunded to nonmember employees who, by law, are required to pay the dues. The state labor relations board refused to hear the case, saying it lacked jurisdiction in these matters. The court agreed and referred the plaintiff to the legislature for a remedy.[163]

In an Illinois decision, a union agreement preventing outside employment by faculty was found to form a constitutional waiver. This decision affirmed the institution's requirement that employees disclose their outside earnings.[164]

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159. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).
160. NLRB v. Lewis Univ., 765 F.2d 616 (7th Cir. 1985).
161. *Id.* at 628.
162. Universidad Cent. De Bayamon v. NLRB, 778 F.2d 906 (1st Cir. 1985).
163. Bodanza v. Public Employment Relations Bd., 490 N.Y.S.2d 445 (N.Y. 1985).
164. Cook County College Teachers Union v. Board of Trustees of Community College Dist. No. 508, 481 N.E.2d 40 (Ill. App. Ct. 1985).

Several cases involved alleged unfair labor practices. In Connecticut, a collective bargaining agreement was negotiated, approved, and accepted by the state legislature. The agreement did not take into account changes, passed by the legislature prior to the agreement, in the retirement benefits assigned to the state's public college teachers. These changes went into effect in the middle of a contract period. The state association of teachers charged that the state had refused to bargain in good faith. The state labor relations board refused to hear the complaint, deferring to the authority of the legislature to change the statute. The court affirmed.[165]

In a Washington case, the state legislature, due to a financial exigency, decided not to award salary increases to community college faculty, as previously agreed in a collective bargaining agreement. The court ruled that, since the state was fully aware of the financial problems at the time of signing the agreement, it could not now defer the salary increase. Deferral was viewed as being the same as cancellation of the contract.[166] In a similar case, the court found that the community college could not cut salaries in the middle of the contract period for financial reasons. Furthermore, they could not use these reduced salaries as the base for the next year's salary increases.[167]

A Florida institution attempted to get the faculty association to waive, in the bargaining agreement, any bargaining over employment decisions made by management during the contract period. The court found this to be an unfair labor practice resulting in a bargaining impasse.[168]

Cases questioning the rulings of arbitrators also were before the courts. In a California case, the court set aside a labor relations board ruling that a nonexclusive bargaining agent had the right to meet and discuss contemplated employee changes with the employer.[169] A Michigan court reversed an arbitrator's decision overturning an institution's dismissal decision.[170] The arbitrator, ordering the employee reinstated even though there was just cause for the dismissal, had exceeded his authority. In a New Jersey case, a faculty member was

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165. Connecticut State College AAUP v. State Bd. of Labor Relations, 495 A.2d 1069 (Conn. 1985).

166. Carlstrom v. Washington, 694 P2d 1 (Wash. 1985).

167. Compton Community College Fed'n of Teachers v. Compton Community College Dist., 211 Cal. Rptr. 231 (Cal. Ct. App. 1985).

168. Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior College, 475 So. 2d 1221 (Fla. 1985).

169. Regents of the Univ. of Cal. v. Public Employment Relations Bd. (Laborers, etc.), 214 Cal. Rptr. 698 (Cal. Ct. App. 1985).

170. Board of Control of Ferris State College v. Michigan AFSCME, 361 N.W.2d 342 (Mich. Ct. App. 1984).

dismissed during his contract period and notified of nonrenewal of his subsequent year's contract. The reasons for the firing were falsification of records, illegal use of institutional property, and insubordination. In arbitration proceedings, the employee was found guilty, but only temporarily suspended, because the arbitrator thought that the contract provided for a progression of actions in employee discipline. The court reversed the suspension decision, stating that the arbitrator had exceeded his authority. The institution had a right to permanently dismiss the employee for cause.[171]

Two final cases in this section raised questions of when arbitration takes precedence over other legal authorities. An Iowa court found that arbitration procedures took precedence over the statutory procedures established for termination.[172] The Third Circuit Court affirmed the lower court decision.[173] The court found that the university was obligated under its collective bargaining agreement to seek arbitration in a controversy surrounding the reorganization of its dietetics department.

Sexual Harassment of Employees

A new section has been added to deal with litigation resulting from sexual harassment of one employee by another employee or supervisor. These cases should not be confused with cases involving sexual harassment of students, summarized in the section on *Termination for Cause*. This new area should continue to see increasing litigation.

In one case, a female employee alleged sexual harassment by another employee of the college and filed charges under title VII of the Civil Rights Act of 1964. Plaintiff sought damages for emotional distress from both the employee and from the institution, under the theory of vicarious liability. The court granted summary judgment to the institution in this case, because such allegations are compensable under Missouri Workers' Compensation Laws. Additionally, the court held that the defendant employee was not acting as an agent of the college, but rather was acting as an independent agent. The court noted that this ruling should not prejudice any claims against the defendant employee as an individual in state court.[174]

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171. County College of Morris Staff Ass'n v. County College of Morris, 495 A.2d 865 (N.J. 1985).

172. Borgen v. Anderson, 366 N.W.2d 583 (Iowa 1985).

173. Hahnemann Univ. v. District 1199C, Nat'l Union of Hosp. and Health Care Employees, 765 F.2d 38 (3d Cir. 1985).

174. Miller v. Lindenwood Female College, 616 F. Supp. 860 (E.D. Mo. 1985).

In another case, it was alleged that the plaintiff's death was the result of sexual harassment. On several occasions, the plaintiff had notified a superior that her supervisor was taking various actions in an effort to coerce her into having sexual relations with him. While initially a meeting was held and the supervisor was warned that his activity should not interfere with his work, the matter was never fully investigated, in violation of university policy. The federal district court rejected the defendant's (the supervisor and his superiors) motion for a summary judgment, and ordered the case to be heard on the factual issues.[175]

STUDENTS

The litigation in the student area continues to be diverse. The Supreme Court decided an important academic dismissal case. Cases revolving around commercial speech and recognition of gay organizations also were decided. The gay rights case, in fact, was significant because it involved recognition at a private institution. Nonresident tuition laws are receiving increasing attention. The courts seem to be flooded with a large number of cases involving financial aid.

Admissions

In a case involving a state maritime academy, a prospective woman student filed a complaint with the United States Attorney General, claiming that she had been discriminated against in her attempts to gain admission. The institution, which had been single-sex before 1973, informed the student that she would not be accepted at the academy. That same year, the institution made the decision to accept females, but not to actively recruit them for admission. In 1980, the United States commenced this action under Title IX for discrimination based on sex. Involved in the claim was the former policy preventing the admission of women, and allegations that the institution continued to discriminate against women in admission and recruitment after the policy change. At trial in the federal district court, the Academy was found to have discriminated against women by maintaining a single-sex admission policy prior to 1976 and, subsequently, in its admission and recruitment policies. The First Circuit Court, on appeal, rejected the Academy's argument that the single-sex policy is important to the national defense and that women are not to

175. Scott v. deLeon, 603 F. Supp. 1328 (E.D. Mich. 1985).

serve in combat positions. Furthermore, an analysis of congressional intent in enacting title IX and cases involving racial discrimination substantiated the authority of the Attorney General to intercede in this case, even though certain parallel statutes contain an exemption for the merchant marine academy.[176] Evidence had been presented that showed that women were treated differently than men in regard to interviews, scheduling for physical examinations, and the qualifications of admitted students. The circuit court affirmed the injunction issued by the district court, permanently enjoining the Academy from intentionally discriminating against women in recruitment and admission policies.

In an admission case concerning the Rehabilitation Act, an applicant to a school of nursing was admitted and, then, based on a physical examination which uncovered a handicap, was not allowed to matriculate. She sued, alleging discrimination against an otherwise qualified handicapped individual. The case had previously been remanded to the lower court.[177] As a result, the plaintiff was admitted, but the institution refused to accept credits taken in the interim at another institution. The school's physician testified that he had not evaluated her on an individual basis. The Ninth Circuit found that the lower court had erred and that she was an otherwise qualified handicapped individual.[178]

In a case which has been before the bench a number of times, the plaintiff filed charges alleging sex discrimination in her denial of admission to seven medical schools.[179] One of the previous cases reached the Supreme Court and established a private right of action under title IX.[180] The federal district court dismissed this claim, based on the doctrine of *res judicata* precluding subsequent litigation.[181] The plaintiff could not bring different claims against the defendant institution after having failed in previous litigation involving the same admissions denial.

The final case in this section involves test scores on a standardized test used in an admission decision. The plaintiff retook the LSAT

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176. United States v. Massachusetts Maritime Academy, 762 F.2d 142 (1st Cir. 1985).

177. Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980).

178. Kling v. County of Los Angeles, 769 F.2d 532 (9th Cir. 1985).

179. *See* The Yearbook of School Law 1982 at 268, Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir. 1981); The Yearbook of School Law 1984 at 304, Cannon v. University of Health Sciences/Chicago Medical School, 710 F.2d 351 (7th Cir. 1983).

180. *See* The Yearbook of School Law 1980 at 119, 200, Cannon v. University of Chicago, 441 U.S. 677 (1979).

181. Cannon v. Loyola Univ. of Chicago, 609 F. Supp. 1010 (N.D. Ill. 1985).

examination and received scores appreciably higher than in the previous exam. The plaintiff was admitted to and enrolled in a law school. Upon a routine examination of the test, the Educational Testing Service (ETS) found irregularities in the handwriting on the second exam. The ETS notified the plaintiff of the problem and gave her the option of retaking the test at no charge. Plaintiff, through her counsel, refused to retake the test. After analysis of four handwriting experts, three of them agreed that the writing sample was not the plaintiff's. The ETS notified the institution that the scores would be cancelled without explanation. The institution terminated the plaintiff's enrollment and she sued ETS, alleging a violation of due process. The federal district court found that ETS was not engaged in due process violations, since it did not come under the state action doctrine by providing scores to a public institution. Also, breach of contract claims were not supported, because ETS followed the procedures outlined in the contract entered into by the plaintiff.[182]

Nonresident Tuition

In a case involving nonresident tuition laws in Washington, a nonresident claimed he was eligible to pay resident tuition because he was a member of the National Guard. The state court ruled that only nonresident military personnel, as defined under the state statute, are exempt from paying out-of-state tuition. National Guard personnel and members of the reserves are not considered military personnel until they are called to duty.[183]

One year after a student moved to a new state and had been enrolled in a state-supported institution, he was denied his request for in-state tuition by a university committee on residency. He based his request on his employment for one year in a cooperative program sponsored by the university. In rejecting his request, the admissions committee found that he had failed to show an intent to remain in the state by occupying a full-time job in the state for one year prior to enrollment at the institution, nor had his employment been continuous. The court ruled that the student had not fulfilled the residency requirements as contained in university regulations, and the denial of his request was not arbitrary or capricious.[184]

In a Michigan case, an out-of-state law student was refused reclassification as a resident for tuition purposes. The committee, on re-

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182. Johnson v. Educational Testing Serv., 615 F. Supp. 633 (D. Mass. 1984).
183. Ward v. Washington State Univ., 695 P.2d 133 (Wash. Ct. App. 1985).
184. *In re* Bybee, 691 P.2d 37 (Kan. 1984).

view of the evidence submitted by the plaintiff, ruled that she had failed to show a domiciliary intent to reside permanently in Michigan. The federal court found that due process rights had not been violated, nor was the committee's action arbitrary or capricious. Plaintiff's equal protection claim failed because she could not show how she was comparable to graduate students on assistantships, for whom the residency requirement is waived, since she had never held an assistantship.[185]

In a New York case involving voting rights and residency, the court affirmed a decision to issue a declaratory judgment and injunctive relief to students who had not been permitted to register to vote.[186]

Financial Aid

The lead case in this section involved the Solomon Amendment, which required applicants for financial aid to complete certain questions on the form as to whether they had registered for the draft. Three theological students, exempt from selective service, refused on religious grounds to complete the "Solomon questions" on their financial aid applications. The district court found the question on the application and the sanction for refusal to be outside the authority of the Solomon Amendment.[187] Reversing, the First Circuit Court found the regulations valid and enforceable.[188] This ruling is consistent with a Supreme Court decision.[189]

A number of cases involved attempts to recover the unpaid balance of student loans. A student and her father signed a promissory note for a National Direct Student Loan. Following her graduation, the institution made various attempts to work out repayment schedules with the defendant. After three years, the institution brought suit to recover the money after correspondence to the former student was returned unclaimed. The court ruled in favor of the institution, consistent with the agreement, because the plaintiff failed to notify the borrower of her enrollment in law school. Lack of notification denied her access to a deferment on the repayment of the loan.[190]

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185. Spielberg v. Board of Regents, Univ. of Mich., 601 F. Supp. 994 (E.D. Mich. 1985).

186. Williams v. Salerno, 622 F. Supp. 1271 (S.D.N.Y. 1985).

187. *See* The Yearbook of School Law 1985 at 336, Alexander v. Trustees of Boston Univ., 584 F. Supp. 282 (D. Mass. 1984).

188. Alexander v. Trustees of Boston Univ., 766 F.2d 630 (1st Cir. 1985).

189. *See* The Yearbook of School Law 1985 at 336, Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 104 S. Ct. 3348 (1984).

190. MacMurray College v. Schiesser, 477 N.E.2d 65 (Ill. App. Ct. 1985).

A private institution's court action against a former student's promissory note was reversed. The former student was denied due process when notification of the action against him was improperly handled. A librarian at plantiff's current address of employment signed for a certified letter in his absence. It could not be substantiated that plaintiff actually received the notice, and he had not designated the librarian as his agent.[191]

In a Wisconsin case, a student with five student loans requested and received an altered repayment schedule. Later, in a Chapter 7 bankruptcy petition, the former student was discharged from the loan. The bankruptcy court ruled that a change in the repayment schedule constituted a suspension of the obligation. The district court, reversing, noted that the loan program regulations give the corporation great latitude to adjust repayments to reflect current financial situations.[192]

Questions of hardship in being required to repay the loan were raised in several bankruptcy litigations. In one bankruptcy case, the court noted that, regardless of whether the father or the son had signed the note, the regulations clearly provided that the loan cannot be discharged in a petition for bankruptcy. However, the court found that the repayment of the loan would cause undue hardship and the obligation was discharged.[193] A number of other cases ended with similar results.[194] Several other cases resulted in a denial of a discharge request, either because the debtor had not substantiated hardship or the court felt the current hardship was only temporary.[195] The Second Circuit Court ruled that the provision in a New York student loan program prohibiting the award of loans to former defaulters did not conflict with the Bankruptcy Code prohibition of discrimination against discharged debtors.[196]

However, a Michigan bankruptcy court held that the institution could not withhold the transcripts of a discharged debtor until he paid back his loan.[197] Finally, an individual, ineligible for a federal loan because of previous defaults, filed a fraudulent loan application by using his father's social security number. The Second Circuit affirmed

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191. Administrators of Tulane Educ. Fund v. Ortego, 475 So. 2d 764 (La. 1985).
192. *In re* Eckles, 52 B.R. 433 (E.D. Wis. 1985).
193. *In re* Feenstra, 51 B.R. 107 (W.D.N.Y. 1985).
194. *In re* Binder, 54 B.R. 736 (D.N.D. 1985); *In re* Savercool, 51 B.R. 180 (W.D.N.Y. 1985).
195. *In re* Avila, 53 B.R. 933 (W.D.N.Y. 1985); *In re* Goldman, 48 B.R. 364 (S.D.N.Y. 1985); *In re* Luna, 54 B.R. 637 (S.D. Fla. 1984); *In re* Springer, 54 B.R. 910 (D. Neb. 1985).
196. *In re* Goldrich, 771 F.2d 28 (2d Cir. 1985).
197. Parraway v. Andrews Univ., 50 B.R. 316 (W.D. Mich. 1984).

his conviction for fraud and forgery.[198]

The state of New York's right to bring action against students to recover loans, interest, and costs was affirmed, even though there had been a change in the state law.[199] The University of Montana was successful in attaching half of the money from a defaulted student loan held for a debtor in a joint savings account. The court ruled that the joint account was tenancy in common entitling the university to half of the amount in the account.[200] A proprietary school was entitled to collect the full amount of an unpaid student loan, even though the student alleged that she failed to attend part of one session of the school year because of the poor quality of the education provided.[201]

Several cases involved the award of a loan viewed as income, resulting in the reduction of welfare benefits. The Sixth Circuit Court ruled that Pell Grant and loan money not specifically earmarked for educational purposes can be viewed as income for the determination of plaintiff's food stamp allotment.[202] A Hawaii court reached a similar ruling in a case involving a nonearmarked private grant and the determination of AFDC benefits.[203] In a related case, a husband in a divorced family was held responsible for the educational expenses of the daughter, even though she had a several year hiatus from college.[204] Finally, the Seventh Circuit ruled that an unsuccessful applicant for financial aid had no claim to a right to a public education at the public's expense. The alleged right was used in an attempt to get his father to release financial information required in the application for financial aid.[205]

One case involved conflicts between the state loan corporation and the lending agency. Several others involved conflicts between the United States Department of Education and a lending agency. A state college aid commission was created to serve as a guarantor of student loans. A financial bank corporation, made up of a number of state banks, obtained permission from the aid commission to act as an eligible lender. It made educational loans to qualified students who might have otherwise been refused by other banks, due to their loan policies. The relations between the two organizations became strained

198. United States v. Gibson, 770 F.2d 306 (2d Cir. 1985).
199. State v. Perkins, 490 N.Y.S.2d 900 (N.Y. App. Div. 1985).
200. University of Mont. v. Coe, 704 P.2d 1029 (Mont. 1985).
201. Louisiana Business College v. Crump, 474 So. 2d 1366 (La. Ct. App. 1985).
202. Burkett v. United States Dep't of Agriculture, 764 F.2d 1203 (6th Cir. 1985).
203. Yamamoto v. Sunn, 700 P2d 938 (Hawaii 1985).
204. Thiele v. Thiele, 479 N.E.2d 1324 (Ind. Ct. App. 1985).
205. Dozier v. Loop College, City of Chicago, 776 F.2d 752 (7th Cir. 1985).

over delays in processing applications and other problems caused by the aid commission's loan carrier. The aid commission notified the bank corporation that it was exercising the sixty-day clause in the agreement and was terminating the relationship. The district court found that the commission could not terminate the relationship and, on appeal, the decision was upheld. Since the relationship between the loan corporation and the commission was one of licensure, a hearing on termination was required.[206]

The Second Circuit upheld the United States Department of Education's right to refuse to pay bills of a lending agency on loans to students at a now defunct institution. The lending agency could not charge interest and penalties.[207] In another case, the district court held that the Department of Education could not withhold payments to lending agencies for reasons unrelated to the specific loan program. In this case, the Treasury Department had asked that funds be withheld as a result of other debts the lending agency had involving forged treasury checks.[208]

First Amendment

Freedom of Speech. The lead case is one that has been before the bench on several occasions over the past few years. Students enrolled at a state-supported institution alleged that a mandatory fee scheme used to fund a Political Interest Research Group (PIRG) infringed upon their first amendment rights. In 1981, the district court held that the refund scheme rendered any constitutional deprivations harmless.[209] The Third Circuit remanded the case and raised the question of proof of the educational value of the organization.[210] On remand, the district court found that the PIRG met specific criteria set out by the institution, which clearly made it an organization operating within the objectives of the educational corporation. They again found the fee collection and refund scheme to be constitutional.[211] The Third Circuit, on appeal, found that the university failed to show any

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206. Hawkeye Bancorporation v. Iowa College Aid Comm'n, 360 N.W.2d 798 (Iowa 1985).

207. Citizens Savings Bank v. Bell, 605 F. Supp. 1033 (D.R.I. 1985).

208. American Bankers Ass'n v. Bennett, 618 F. Supp. 1528 (D.D.C. 1985).

209. *See* The Yearbook of School Law 1982 at 272, Galda v. Bloustein, 516 F. Supp. 1142 (D.N.J. 1981).

210. *See* The Yearbook of School Law 1983 at 315, Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982).

211. *See* The Yearbook of School Law 1985 at 338, Galda v. Rutgers, 589 F. Supp. 479 (D.N.J. 1984).

compelling state interest rights and presented no evidence that educational experiences gained through involvement in the PIRG could not be gained through other means. The court ruled that the compulsory fee payable to PIRG through the university could not be continued and halted the collection of said fees.[212]

A nonstudent organization, Socialist Workers Party and Young Socialist Alliance, had been allowed to set up and staff an information table in the student union building at a state-supported institution. They were allowed to distribute newspapers and related reading materials to interested students. When the plaintiffs were found trying to sell newspapers absent permission to solicit, they were removed from the area and ordered to cease their activity. A state-wide policy prohibited solicitation and sales except by groups directly connected with the institutions. The court held that expression had not been infringed and that commercial speech may be regulated without infringing on the right of expression.[213] The college has a right to preserve the campus for its intended purpose and to protect students from the pressures of solicitation. Opportunities were available to obtain student sponsorship and to solicit on campus.

Freedom of Expression. Two student gay rights groups brought action against a Catholic university following its refusal to grant official recognition to the organizations. An earlier court decision ruled that the refusal was protected by the free exercise clause of the first amendment, even though the action had violated the Human Rights Act prohibition in effect in the locale in which the institution was located. Following established university guidelines, the groups had petitioned the student government for recognition. The student government approved the application, but the university administration refused recognition, claiming that recognition would imply endorsement of the gay organizations' goals antithetical to the goals of a Catholic institution. Using the *Bob Jones University*[214] decision, they argued that the Human Rights Act established a public policy against discrimination based on sexual orientation, superseding the free exercise claims of the university. The court ruled that the district interest in enforcing the Human Rights Act outweighed the burden that the Act places on the university's exercise of religious beliefs, and

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212. Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985).

213. Glover v. Cole, 762 F.2d 1197 (4th Cir. 1985).

214. *See* The Yearbook of School Law 1984 at 280, Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983).

that the university must grant recognition.[215]

In another case involving recognition of a gay rights organization at Texas A & M University, the Supreme Court denied a petition for a rehearing.[216] This petition was from a Fifth Circuit Court ruling ordering recognition of the gay organization.[217]

Dismissal

Disciplinary Dismissal. This section saw a substantial number of cases involving cheating. Other cases involve actions arising out of a 1969 rally, and denial of a diploma due to unpaid parking violations.

The plaintiffs in this case, students at a state university, participated in a 1969 rally. The institution took disciplinary action against them in the form of probations and expulsions. Suit was filed in 1969, alleging violations of due process and a litany of litigations followed, including the case at bar.[218] In the present case, the plaintiffs alleged that the defendants violated their federal and state constitutional rights. The court held that there was no evidence to show that the students who attended the rally individually committed disorderly acts required to support the disciplinary action against them. This supported the plaintiffs' claim that their due process rights had been violated. The court remanded the case, with instructions for the lower court to order the destruction by the defendants of the plaintiffs' disciplinary records.[219] In another case, a New York state court upheld the university's procedures that were used in a disciplinary action against students.[220]

A law student had accumulated a large number of parking tickets in violation of university parking policy. He was refused re-admission for the spring semester for nonpayment of the tickets. After acquiring an injunction, he finished the requirements for his degree. The university refused to award the diploma until payment of the outstanding balance was made, but issued a certificate acknowledging satisfactory completion of the degree program. A Texas court found that the park-

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215. Gay Rights Coalition v. Georgetown Univ., 496 A.2d 567 (D.C. Cir. 1985), *vacated, reh'g granted*, 496 A.2d 587 (D.C. Cir. 1985).

216. Texas A&M Univ. v. Gay Student Servs., 105 S. Ct. 2369 (1985).

217. *See* The Yearbook of School Law 1985 at 340; Gay Student Servs. v. Texas A&M Univ., 737 F.2d 1317 (5th Cir. 1984).

218. Wong v. Hayakawa, 464 F.2d 1282 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973); Jackson v. Hayakawa, 605 F.2d 1121 (9th Cir. 1979), *cert. denied*, 445 U.S. 952 (1980); Jackson v. Hayakawa, 682 F.2d 1344 (9th Cir. 1982).

219. Jackson v. Hayakawa, 761 F.2d 525 (9th Cir. 1985).

220. Fain v. Brooklyn College of CUNY, 493 N.Y.S.2d 13 (N.Y. App. Div. 1985).

ing and traffic regulations provide for a hearing which the individual waived. The administrative hearing in this case met the requirements of fairness.[221]

A number of cases involved cheating. A medical student was charged with falsification of his application and admission materials and a university disciplinary committee recommended dismissal. The president and the board upheld the decision. The plaintiff brought suit, challenging the administrative dismissal process. In refusing to grant relief, the court noted that his status as a student was dependent totally upon the submission of falsified documentation in support of his application.[222] Fraud in the procurement of an agreement negates the agreement. The court also found no evidence or material that supported the plaintiff's contention that bias had been shown by the members of the original hearing board, and that due process had not been followed.

A student at one of the service academies sought an injunction preventing him from being expelled and allowing him to receive grades and credits for that semester. The student had been charged with plagiarism, misconduct, cheating, and other conduct violations. Following the hearing, in accordance with the university regulations, the student was honorably discharged and disenrolled. The burden in this case was on the student to demonstrate irreparable harm. A motion for a preliminary injunction was denied, since the plaintiff failed to show the likelihood of success on the merits of his case.[223]

A University of Michigan student was suspended for one term for cheating on a final exam. The student sued, alleging denial of procedural due process in violation of his constitutional rights. The specific violation involved the switching of examination cover sheets and submitting his cover sheet with the responses of another student. The student was given notice of the charges and an opportunity to present his version of events to an impartial panel. The court ruled that his due process rights were effectively guaranteed.[224] Furthermore, the court noted that precedent shows no absolute right to legal counsel at disciplinary hearings.

Dental students involved in cheating were dismissed after hearings before a disciplinary committee and the academic dean. At trial, the court found that the university did not comply with its own rules

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221. Haug v. Franklin, 690 S.W.2d 646 (Tex. Ct. App. 1985).
222. North v. West Va. Bd. of Regents, 332 S.E.2d 141 (W. Va. 1985).
223. Tully v. Orr, 608 F. Supp. 1222 (E.D.N.Y. 1985).
224. Jaksa v. Regents of the Univ. of Mich., 597 F. Supp. 1245 (E.D. Mich. 1984).

and due process procedures. As a result, one student was ordered readmitted; however, the dismissals of two other students were affirmed since they had admitted guilt. On appeal, the court found that the procedures followed in all of the dismissals satisfied the due process requirements of the Constitution. In reversing the trial court decision, the court affirmed the institution's disciplinary decision.[225]

In another cheating case, the district court found that fundamental fairness characterized the process of the dismissal of a student at a private university.[226] And, in a case where students at a public institution had given aid and assistance during a final examination, the district court found that procedural due process requirements had been met. The court also found that the evidence supported the finding of guilt by the institutional disciplinary tribunal and that the students' contract had not been breached.[227]

Academic Dismissal. The Sixth Circuit Court ruled that an institution's refusal to allow a student to retake a test a second time, a common practice for this particular testing program, was an arbitrary decision violating the student's property interest and resulting in his dismissal.[228] However, the Supreme Court overturned this circuit court decision. The Court found that the university had used adequate professional judgment in evaluating both previous academic performance and the performance on the first test as the basis for a refusal to retake the test.[229] The opinion stated:

> The record unmistakenly demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[230]

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225. Patterson v. Hunt, 682 S.W.2d 508 (Tenn. Ct. App. 1984).
226. Clayton v. Trustees of Princeton Univ., 608 F. Supp. 413 (D.N.J. 1985).
227. Nash v. Auburn Univ., 621 F. Supp. 948 (M.D. Ala. 1985).
228. *See* The Yearbook of School Law 1985 at 345, Ewing v. Board of Regents of the Univ. of Mich., 742 F.2d 913 (6th Cir. 1984).
229. Regents of the Univ. of Mich. v. Ewing, 106 S. Ct. 507 (1985).
230. *Id.* at 513.

A number of cases have reached similar results. In one, the court refused to hold that a breach of contract existed when the school refused, based on poor performance, to award a certificate for completion of postdoctoral work.[231] A doctoral student's due process and equal protection rights were not violated because he received failing grades which resulted in his academic dismissal.[232] A Michigan case yielded a similar result, with the exception of state claims which are pending in state court.[233] In a Pennsylvania case, a student was unable to substantiate that sexual harassment rather than poor performance was the cause of her failing grade.[234] Action by a dismissed student against a private university, filed under the Family Educational Rights and Privacy Act, found that the Act did not yield access to a cause of action.[235] In two state claims involving academic dismissal, the court rejected both breach of contract and civil rights claims.[236]

In a Michigan case, a student who failed to complete a one-credit course and, therefore, did not receive his law degree filed suit. He was unable to show that he possessed a property interest in either the degree or the one credit.[237]

In a related case involving academic standards, the California Bar required those attending an unaccredited law school to pass a first-year law student examination before receiving credit for the year of study. A student in a law correspondence school failed the test the first time she took it and brought suit to have the requirement declared unconstitutional. The court ruled that the test met a legitimate governmental purpose, to certify only competent lawyers and training programs, and did not violate the equal protection clause.[238]

Other Constitutional Privileges

In one case, originally filed to challenge the constitutionality of student government requirements to ensure minority representation on a state university's judicial committee, the court struck down the

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231. Kraft v. William Alanson White Psychiatric Found., 498 A.2d 1145 (D.C. Cir. 1985).

232. Ikpeazu v. University of Neb., 775 F.2d 250 (8th Cir. 1985).

233. Litka v. University of Detroit Dental School, 610 F. Supp 80 (E.D. Mich. 1985).

234. Moire v. Temple Univ. School of Medicine, 613 F. Supp 1360 (E.D. Pa. 1985).

235. Smith v. Duquesne Univ., 612 F. Supp. 72 (W.D. Pa. 1985).

236. Chism v. University of Kan., 699 P2d 43 (Kan. 1985); Simmons v. Sowela Technical Inst., 470 So. 2d 913 (La. Ct. App. 1985).

237. Easley v. University of Mich. Bd. of Regents, 619 F. Supp. 418 (E.D. Mich. 1985).

238. Lupert v. California State Bar, 761 F.2d 1325 (9th Cir. 1985).

provisions as a violation of plaintiffs' rights to equal protection under the fourteenth amendment.[239] The plaintiffs, as the prevailing party, were entitled to an award of attorney fees and the university was ordered to pay $136,714 for the plaintiffs' costs in this litigation.[240]

A student-teaching program at a state university allowed students to satisfy their practice teaching requirements at private and parochial schools. The plaintiffs alleged that the institution was funding and administering a program that advanced religion, in violation of the establishment clause of the first amendment. The legal precedents governing this case (i.e., the statute must have secular legislative purpose, its primary effect must neither advance nor inhibit religion, and it must not foster excessive government entanglement with religion) were set out by the Supreme Court.[241] The Court found that the policy advanced religion, because the parochial schools received funds for participation in the program; interaction with the university provided access to methods and ideas on improving education; and recruitment opportunities existed, while a visible connection between the public university and the private religious schools also was provided. The practice was ruled unconstitutional and the university was permanently enjoined from allowing students to practice teach in private and parochial schools.[242]

Individuals brought a racial discrimination charge against the state and the university. They charged that the institution was discriminating against blacks in publications, housing, financial aid, student employment, and hiring. The Fifth Circuit ruled that filing of the charge was correct so as to not offend eleventh amendment immunity. The lower court ruling was reversed and remanded.[243]

Two veterans who were in prison brought suit to declare unconstitutional a statute that limited education benefits to veterans who were incarcerated in a federal, state, or local correction facility to cost of tuition, fees, and supplies. They charged that these regulations denied them subsistence benefits, in violation of the equal protection clause. Subsistence benefits are limited to education costs not being paid from other governmental sources. Congress had enacted the provisions to reduce duplication of payments to those receiving the benefits and to reduce funds available to buy narcotics in prison. The court

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239. *See* The Yearbook of School Law 1985 at 343, Uzzell v. Friday, 592 F. Supp. 1502 (M.D.N.C. 1984).
240. Uzzell v. Friday, 618 F. Supp. 1222 (M.D.N.C. 1985).
241. Lemon v. Kurtzman, 403 U.S. 602 (1971).
242. Stark v. St. Cloud State Univ., 604 F. Supp. 1555 (D. Minn. 1985).
243. Jones v. Louisiana, 764 F.2d 1183 (5th Cir. 1985).

ruled that their needs are already being provided for by the government, and summary judgment was found for the defendants.[244]

In the final case of this section, a student sued an agent of the Federal Bureau of Investigation on charges of defamation and violation of constitutional rights. The court found no violations or defamation in the distribution of information on a black nationalist group and its leaders.[245]

LIABILITY

Personal Injury

There were a number of cases involving personal injury to members of the academic community or visitors to the campus.

A New York case involved the death of a man who fell after becoming intoxicated at a campus establishment which served alcoholic beverages. "The Pub" was alleged to have been negligent in failing to supervise the alcoholic consumption of the widow's deceased husband. The New York court held that the selling or giving of alcoholic beverages to an adult has never been a tort. Furthermore, the court found that the owner of the establishment had no common law responsibility to protect the individual from the results of his voluntary intoxication with the exception of injury to a third party by the intoxicant.[246]

In another case, a thirteen-year-old spectator was struck in the face by a puck at a collegiate hockey game. The spectator was seated behind the goal where a new glass barrier, one foot lower than the previous barrier, had recently been installed. Netting previously hung behind the barrier was also not in place. Since the plaintiff had not been notified of the changes and any additional risk, culpable conduct could not be attributed to any of her actions. Precaution taken at previous games was an indication of the state's awareness of what was required as a reasonable precaution. The court found that the state had a duty not only to provide adequate protection, but also to warn spectators that the current protection was less than what was previously provided. Damages were awarded to the plaintiff.[247]

Another case, involving injury from a fall on an icy sidewalk, concerned the standard of care required of a municipality. A student

244. Greenwell v. Walters, 596 F. Supp. 693 (M.D. Tenn. 1984).
245. Kenyatta v. Moore, 623 F. Supp. 220 (S.D. Miss. 1985).
246. Allen v. County of Westchester, 492 N.Y.S.2d 772 (N.Y. App. Div. 1985).
247. Sawyer v. State, 485 N.Y.S.2d 695 (N.Y. Ct. Cl. 1985).

fell on a pathway maintained by the community college. The court established that the standard of care required of the college was similar to that of a private owner of a premise. Also, the plaintiff must prove that the defendant had a duty to use reasonable care in keeping the pathway free of ice and snow where public use was foreseeable and that the danger to pedestrians should have been foreseen reasonably.[248]

A New York case, involving the rape and murder of a coed off campus by another student, was affirmed on appeal.[249] The state was found negligent in failing to inform the institution of the dangers of admitting a student with a previous record of drug abuse and violent crime. Furthermore, the public institution was negligent in not establishing reasonable criteria in its program to admit economically and educationally disadvantaged individuals. The court found the institution negligent in the murder of the student, but with no duty to the nonstudent also injured in the incident.[250]

Several cases involved the liability of institutions and their medical centers in malpractice suits against physicians in the institutions' employ who also had private practices at the medical centers. In a Massachusetts case, the institution was not liable for the suit against a physician in its employ who had been sued as a result of his private practice at the institution. Additionally, the physician could not claim sovereign immunity simply because he was a public employee.[251] However, in another case, where resident physicians in a burn unit improperly administered an anesthetic in the process of removing dead skin from the patient's hand, resulting in death, the private university medical center and the director of the burn unit were held liable. The director of the burn unit, a university faculty member in charge of training and supervising the residents, was negligent in providing supervision.[252]

Workers Compensation

Cases litigating issues of whether employees injured during work

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248. Mead v. Nassau Community College, 483 N.Y.S.2d 953 (N.Y. Sup. Ct. 1985).

249. *See* The Yearbook of School Law 1985 at 347, Eiseman v. State, No. 60491, (N.Y. Ct. Cl. 1983).

250. Eiseman v. State, 489 N.Y.S.2d 957 (N.Y. App. Div. 1985).

251. Smith v. Steinberg, 481 N.E.2d 1344 (Mass. 1985).

252. Jaar v. University of Miami, 474 So. 2d 239 (Fla. Dist. Ct. App. 1985).

qualified for workmen's compensation were before the courts again in 1985.

The widow of a faculty member killed in an automobile accident while on the way home alleged that his death occurred during work. She asserted that he often brought work home and completed it in the evenings and had work with him at the time of his death. The crux of her argument was that he was not "going or coming" from his job, but rather was enroute from one work location to another work location in the course of his job. The Workmen's Compensation Appeals Board awarded death benefits to the widow. The institution appealed that decision. The court rejected the claim of the home as a second job site and ruled that death occurred while commuting to or from the job. The workmen's compensation claim was, therefore, denied.[253]

In another case, a custodian alleged that she received a back injury on the job while she was lifting a heavy item. Evidence at trial cast doubt on plaintiff's testimony. Evidence included insurance forms which indicated a discrepancy in the date of the injury and whether the injury was actually work related. Plaintiff testified that the forms were filled out by a medical specialist and she had not read them when she signed the forms. Given the evidence at trial, the court found no error in the trial court's decision to deny compensation.[254]

An employee sought disability compensation for multiple sclerosis. The court ruled that the disease was not caused by employment nor was evidence presented to show that his job exposed him to hazards or stress greater than he would find in everyday living.[255]

Plaintiff, during a hearing before the workmen's compensation board, was required to be evaluated by various medical experts. These experts later provided differing results in terms of the plaintiff's cause of injury. The final expert recommended that a psychiatrist also be brought in for evaluative purposes. The board refused to seek this evaluation and denied benefits based on the inconclusive findings of the other medical experts. The court found that the board had erred in not relying on the testimony of the physician who treated the plaintiff immediately after the accident when no evidence was presented by the medical experts which clearly refuted his diagnosis. The case was remanded for an award of compensation.[256]

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253. Santa Rosa Junior College v. Workers' Compensation Appeals Bd., 708 P2d 673 (Cal. 1985).

254. Neldare v. Board of Supervisors of Southern Univ., 460 So. 2d 26 (La. Ct. App. 1984).

255. Massie v. University of Fla., 463 So. 2d 383 (Fla. Dist. Ct. App. 1985).

256. Blackshear v. Bethune Cookman College, 467 So. 2d 721 (Fla. Dist. Ct. App. 1985).

Contract Liability

Litigation involving a breach of contract was voluminous again this year. Some cases involved the construction of buildings, others involved contracts for services. Contract cases involving both faculty and students also were present.

In one contract case, a food service purveyor had the responsibility to provide a building which would be leased by the institution during the five-year period of the contract. For one dollar, the building could be purchased by the university at the end of the contract period, provided the notice of purchase was received sixty days prior to the termination date of the contract. Otherwise, the purveyor had the responsibility of removing the building from the institution's land. Notification of purchase was given, but not in compliance with the sixty-day provision. The purveyor sued for damages and the cost of the building. The court found that the institution's failure to comply with the sixty-day provision was a harmless error resulting in no damage to the plaintiff.[257]

A number of cases involved successful claims against contractors and architectural firms for poor design or construction of buildings, resulting in costly repairs.[258] In one case, a contractor sought an injunction to prevent the award of a contractor to the highest bidder. A committee on the proposed research facility had recommended that the design of the highest bidder was the most durable, from the perspective of the research needs of the project. The court found that the institution had used reasonable discretion in the award of the contract.[259] The signature of a public university's vice president on a written agreement did not bind the institution to the agreement without specific ratification by the board, as provided by statute.[260] A New York court, in a similar ruling, found that an administrator at a public institution could not bind the institution to a contract without authority to do so.[261]

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257. Ames Contracting Co., Inc. v. City Univ. of N.Y., 485 N.Y.S.2d 259 (N.Y. App. Div. 1985).

258. Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., Inc., 328 S.E.2d 274 (N.C. 1985); Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs., 492 N.Y.S.2d 371 (N.Y. App. Div. 1985).

259. Integrated Dev. & Mfg. Co. v. University of Minn., 363 N.W.2d 845 (Minn. Ct. App. 1985).

260. El Camino Community College Dist. v. Superior Court of Cal., 219 Cal. Rptr. 236 (Cal. Ct. App. 1985).

261. Dempsey v. City Univ. of N.Y., 483 N.Y.S.2d 24 (N.Y. App. Div. 1984).

In a Tennessee case, the plaintiff, a co-principal investigator for a funded research grant, claimed that another university and one of its faculty conspired to remove his name from the proposal and to resubmit it with one principal investigator. Based on the state's immunity from prosecution, and due to the fact that the tort claim was filed after the statute of limitations had expired, the case was dismissed.[262]

In another case, a researcher was given a tape recorder and, for a fee, traveled the New England area interviewing acquaintances of a renowned author. Without the university's approval, he also solicited and received papers and other memorabilia, which the donors had intended for the institution's library. When the university became aware that the researcher was in possession of rare documents intended for deposit with their library, they made several requests to the researcher for the documents. The researcher's failure to respond resulted in the placement of a notice in *Bookmen*, indicating that this person was misrepresenting himself as an agent of the university and had illegal possession of rare documents of the famous author which were intended for the university library. In 1974, the institution filed action to replevin the documents, and the researcher filed a counterclaim alleging libel based on the published notice. The district court ruled that the notice in *Bookmen* was true and, therefore, not libelous, and that the giving of a tape recorder and expenses for travel was not authorization to solicit documents. The federal circuit court affirmed the district court decision.[263]

Several contract cases involved students or student organizations. Yale University sought an injunction to prevent *The Yale Literary Magazine* from using the university's name. On appeal, the court found that trade regulations restricting the use of a trade name was an adequate basis to issue an injunction restricting the use of the institution's name.[264]

In a nonrenewal of a lease to a tenant affiliated with the institution, the court ruled that the laws governing removal of tenants did not apply. Exempt from the law are tenants renting university housing who are affiliated with the institution either as employees or students. Therefore, the institution did not have to conform to the law's notification requirements in a nonrenewal of a lease.[265]

In a case involving a proprietary school, the plaintiff alleged a

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262. Carlson v. Highter, 612 F. Supp. 603 (E.D. Tenn. 1985).

263. Brown Univ. in Providence, v. Kirsch, 757 F.2d 124 (7th Cir. 1985).

264. Yale Literary Magazine v. Yale Univ., 496 A.2d 201 (Conn. Ct. App. 1985).

265. Trustees of Columbia Univ. v. James, 489 N.Y.S.2d 669 (N.Y. App. Div. 1985).

breach of contract in her removal from the institution for disciplinary reasons. Plaintiff became involved in a controversy over the use of school funds, which eventually resulted in a legal complaint being filed against the school. Both faculty and fellow students testified that the plaintiff had always handled herself in a mature and responsible manner, contrary to the reason given for her dismissal. The lower court dismissed the case on the defendant's motion. On appeal, the court found that the plaintiff had established evidence to indicate that her contract with the proprietary school had been breached by her dismissal and remanded the case for further action.[266]

Deceptive Practices

The deceptive practices of an institution in its admissions and programs, a new section to this chapter, was before the courts. In the case at bar, the plaintiff responded to an advertisement in the newspaper for applications to a geological drafting program at a proprietary institution. In a meeting with the school's counselor, whose salary is based in part on a commission for students recruited, she was advised to enroll in a drafting curriculum, since the geologic program was only in the formative stages with no guarantee that it would ever be offered. At the time of matriculation, earlier having completed financial aid forms for a BEOG and a HELP grant, the plaintiff was asked to fill out forms which were represented as part of the already awarded grant-in-aid programs. However, the forms were, in fact, for an NDSL loan. Later, after attending the institution for a time, the plaintiff was involved in an automobile accident and had to take a leave of absence from the college, for which she was advised she would not be charged tuition. After returning for a short period, she was sent a bill for tuition during the leave period and later withdrew and filed this action. The plaintiff charged the school with false advertising, misrepresentation of facts, intentionally suppressing or omitting facts, and offering property or services without the intent to deliver them. The trial court found the institution guilty and awarded damages to the plaintiff. The Kansas Supreme Court affirmed the lower court decision that the institution was guilty of a violation of the state's consumer protection act and was appropriately fined.[267]

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266. Fussell v. Louisiana Business College of Monroe, Inc., 478 So. 2d 652 (La. Ct. App. 1985).

267. Manley v. Wichita Business College, 701 P.2d 893 (Kan. 1985).

Educational Malpractice

Another new section was added to this year's chapter to deal with litigation related to educational malpractice in higher education. In one case, a physician who had just begun his internship at a hospital was involved in a delivery resulting in brain damage to an infant, and a medical malpractice suit was brought against him. He sued the director of medical education for educational malpractice. The plaintiff alleged that the proximate cause of the malpractice suit was the failure of the director to adequately supervise the internship program. The court, citing three prominent educational malpractice cases,[268] used the public policy argument to refuse to allow a cause of action for educational malpractice. The court stated:

> The legislature has vested the board of medical examiners, the board of higher education, and the advisory graduate medical education council with the authority to insure that the proper medical education is delivered within New Jersey. It would be against public policy for the court to usurp these functions and inquire into the day-to-day operation of a graduate medical education program. From the standpoint of court administration, it would be unwise to recognize a claim for educational malpractice where an individual physician is attempting to defend against a malpractice claim . . . . Therefore, for reasons of public policy, there is no legal duty which will support a tort for educational malpractice in this class of case.[269]

In another case, the plaintiff charged "athletic official's malpractice" over a controversial call at a college basketball game. After the game, the plaintiff, a novelty store owner, marketed a T shirt critical of the referee. The referee sought an injunction and damages, and the plaintiff counter-sued, bringing the malpractice allegation. The court found no basis in law for a cause of action based on "athletic official's malpractice."[270]

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268. Peter W. v. San Francisco Unified School Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976); Donohue v. Copiague Union Free School Dist., 408 N.Y.S.2d 584 (N.Y. Sup. Ct. 1977), *aff'd*, 407 N.Y.S.2d 874 (N.Y. App. Div. 1978), *aff'd*, 418 N.Y.S.2d 375 (N.Y. 1979); Hoffman v. Board of Educ. of the City of N.Y., 410 N.Y.S.2d 99 (N.Y. App. Div. 1978), *rev'd*, 424 N.Y.S.2d 376 (N.Y. 1979).

269. Swidryk v. St. Michael's Medical Center, 493 A.2d 641 (N.J. Super. Ct. App. Div. 1985).

270. Bain v. Gillispie, 357 N.W.2d 47 (Iowa Ct. App. 1984).

Negligence

In a New York case, the court, on appeal, found that there were trial issues to support the denial of a summary judgment and to let stand an amended answer of contributory negligence. The case involved a college's charge against a bank to recover damages on forged checks or checks drawn on an unauthorized clerk's signature.[271]

Another case involved an appeal from a jury trial of a case in which a utility company was found negligent in the maintenance of a utility line to a music building on the college campus which, as a result, burned. The court found that adequate evidence was presented to find that the utility company's failure to maintain adequate clearance between power lines and trees was the cause of the fire. Furthermore, the court ruled that replacement costs of the building, not the value before or after the fire, was the appropriate damage assessment.[272]

NCAA Regulations and Sanctions

Regulations and sanctions issued by the NCAA were again before the courts. These cases continue to center on either eligibility rules or the sanctions placed on institutions violating the regulations. One case raised antitrust questions.

In a case involving Cornell University, an NCAA Division I school, a transfer student sued, alleging denial of due process and equal protection rights. The NCAA rule banning transfer students from playing in intercollegiate sports prior to completing one year of attendance at the institution resulted in the denial of the plaintiff's request to play football for the institution. Plaintiff alleged that he should be exempt, since he transferred for academic reasons and was not recruited. The court dismissed the case, finding that the NCAA and Cornell University, a private corporation, were not involved in "state action."[273]

In another case, a basketball player sought a preliminary injunction against the NCAA. The association has a rule which counts participation in organized sports after the age of twenty, but before attendance at a college, as one year of eligibility. In spite of allegations of

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271. Five Towns College v. Citibank, N.A., 489 N.Y.S.2d 338 (N.Y. App. Div. 1985).

272. Culver-Stockton College v. Missouri Power and Light Co., 690 S.W.2d 168 (Mo. Ct. App. 1985).

273. McHale v. Cornell Univ., 620 F. Supp. 67 (N.D.N.Y. 1985).

possible discriminatory impact, the Third Circuit Court found that the district court was correct in refusing to grant the injunction, based on the association's legitimate nondiscriminatory reason for enforcing the rule. The NCAA had argued that the rule was established to foster equality of competition by preventing athletes from staying out of college to hone their athletic skills, giving more mature individuals an edge in the awarding of college athletic scholarships.[274]

In another case, a hockey player and his father, whose corporation was the sponsor of a Canadian hockey team, sued the university and the NCAA. The son questioned the legality of the rule which classified him as professional, because he played on a hockey team without compensation. The hockey team in question was sponsored by his father's company. His father attempted to join the suit, alleging damage to his team's ability to recruit players in light of the NCAA ruling concerning denial of amateur status. The district court found that the father had failed to meet the requirements of joinder and, therefore, his complaint was dismissed. Also, the son failed to establish a constitutional right to participate in intercollegiate athletics, nor had he shown that a liberty interest or a property interest were violated in the denial to participate.[275]

A Maryland court overturned a lower court ruling granting a permanent injunction against the NCAA, preventing it from sanctioning two lacrosse players and the institution, based on the NCAA enforcement program. The institution sought this injunction because previous litigation had resulted in a court-ordered injunction, allowing the two students to play lacrosse.[276] This court dismissed both of the previous litigations as moot as well as the judge's motion for a permanent injunction against the NCAA.[277]

ANTITRUST

This antitrust case involved the requirements of an institution that all freshmen under the age of twenty-one who were not residing with their parents must reside in university housing. Owners of a private dormitory brought this action. Not only was the institution requiring freshmen to live in its residence halls, but it also assigned

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274. Butts v. National Collegiate Athletic Ass'n, 751 F.2d 609 (3d Cir. 1984).
275. Karmanos v. Baker, 617 F. Supp. 809 (E.D. Mich. 1985).
276. *See* National Collegiate Athletic Ass'n v. Tucker, 476 A.2d 1160 (Md. 1984).
277. National Collegiate Athletic Ass'n v. Johns Hopkins Univ., 483 A.2d 1272 (Md. 1984).

them to temporary spaces, even after all of its rooms were filled. The private dorm proprietor alleged that, even though this was done with the option that they seek housing elsewhere, notice was at such a late date that the student could not effectively enter the market. The federal district court ruled that sovereign immunity prevented the award of monetary damages. Furthermore, as to the question of antitrust, the institution, as an agent of state government, was exempt from the antitrust law and could have rules requiring students to live in residence halls in order to fill available spaces. However, state action does not necessarily apply to the way the institution was implementing this regulation. An issue remains as to whether the implementation was a clear furtherance of a state policy rather than an intentional delay and misrepresentation, which goes beyond the public policy. While the case was remanded, the court ordered a pretrial hearing to attempt to resolve the issue, since no damages were involved.[278]

In another case, the University of Georgia Athletic Association sought a permanent injunction against a beer distributor's use of an English bulldog on its beer cans labeled "Battlin' Bulldog Beer." The district court issued an injunction. On appeal, the Eleventh Circuit Court found that under the Lanham Act[279] the choice by the association of an English bulldog as its "suggestive" mark meant that the institution was not required to prove some secondary meaning for the federal act to prevail. The court also found that the disclaimer on the cans did not serve to alleviate the confusion over their origin. The lower court decision was affirmed, preventing the distributor from using the English bulldog on the label of his product.[280]

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278. American Nat'l Bank and Trust Co. of Chicago v. Board of Regents for Regency Univs., 607 F. Supp. 845 (N.D. Ill. 1984).

279. 15 U.S.C. § 1125(a), trademark infringement.

280. University of Ga. Athletic Ass'n v. Laite, 756 F.2d 1535 (11th Cir. 1985).

TABLE OF CASES

Abbott v. Burke, 201, 202
Abel v. School Dist. No. 413, 183
Aberant v. Wilkes-Barre Area School Dist., 166
Abington Township School Dist. v. Schempp, 98
Abood v. Detroit Bd. of Educ., 35, 37
Acker v. Spangler, 155
A.D.F., *In re*, 81
Adams v. Board of Pub. Educ., 191
Adams v. Dothan Bd. of Educ., 108
Adamsons v. Wharton, 253
Adler v. Education Dep't of State of N.Y., 142
Adlerstein v. Board of Educ., 18
Administrators of the Tulane Educ. Fund v. Cooley, 229
Administrators of the Tulane Educ. Fund v. Ortego, 265
Adolphe v. St. Louis Community College, 237
Adult Student Housing, Inc. v. State, 193
Aguilar v. Felton, 95, 198, 199
Aguillard v. Edwards, 99
Aguillard v. Green, 99
Air Eng'rs, Inc. v. Commonwealth, 184
Akron-Canton Chapter, Am. Subcontractors Ass'n v. Ohio Dep't of Admin. Servs., 193
Alabama v. Pugh, 113
Alabama State Tenure Comm'n v. Phenix City Bd. of Educ., 22
Alabama State Tenure Comm'n v. Shelby County Bd. of Educ., 29
Alabama State Tenure Comm'n v. Singleton, 30
Alban v. Board of Educ. of Harford County, 126, 148
Albany Medical College v. McShane, 192, 253
Aldine Indep. School Dist. v. Moore, 183
Alerding v. Ohio High School Athletic Ass'n, 87
Alexander v. Trustees of Boston Univ., 264
Allegheny Intermediate Unit v. Jarvis, 21
Allemeier v. University of Wash., 194
Allen v. County of Westchester, 194, 274
American Bankers Ass'n v. Bennett, 267
American College, *In re*, 193
American Nat'l Bank and Trust Co. of Chicago v. Board of Regents for Regency Univs., 283
Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 94, 196
Ames Contracting Co., Inc. v. City Univ. of N.Y., 193, 277
Amoss v. University of Wash., 246
Anaheim City School Dist. v. County of Orange, 183
Anderson v. City of Bessemer, 4
Anderson v. Jackson County Bd. of Educ., 183
Anderson v. Thompson, 128
Anderson v. University of N. Iowa, 233
Andre H. v. Ambach, 126
Andrew H. v. Ambach, 207, 208
Antkowiak v. Ambach, 125, 131
Antwine v. Dallas Indep. School Dist., 190
Arbegast v. Board of Educ., 163
Arfin v. Ambach, 29
Arline v. School Bd. of Nassau County, 8, 144
Arnold v. Crockett Indep. School Dist., 183, 217
Aronson v. City of Pittsburgh, 176
Arthur v. Nyquist, 117
Arvin Union School Dist. v. Ross, 182
ASARCO, Inc. v. McHenry, 218
Asbestos School Litig., *In re*, 186
Asbestos School Prods. Liab. Litig., *In re*, 186
Asheville School v. D.V. Ward Constr., 186
Atascadero State Hosp. v. Scanlon, 139, 140, 145
Attorney Gen. v. East Jackson Pub. Schools, 74
Audet v. Board of Regents, 14, 33
Austin v. Brown Local School Dist., 137
Avila, *In re*, 265

B.L.P., *In re*, 81
Babitzke v. Silverton Union High School No. 7J, 21
Bailey v. Truby, 86
Bain v. Gillispie, 280
Baker v. Independent School Dist., 24
Baker v. Vanderbilt Univ., 191
Balentine v. Arkansas State Bd. of Educ., 33
Banas v. Dempsey, 113
Baranowski v. Cornell Univ., 243

Barnes v. United States, 255
Batla v. North Dakota State Univ., 246
Bazemore v. Friday, 233
Beall v. Curtis, 241
Beardell v. Western Wayne School Dist., 161, 190
Beaverton Educ. Ass'n v. Washington County School Dist. No. 48, 51, 62
Bechtel v. Crown Petroleum Corp., 43
Beeman v. Board of Educ., 26
Belasco v. Board of Pub. Educ., 18
Belcher v. Jefferson County Bd. of Educ., 28, 159
Bell v. Little Axe Indep. School Dist. No. 70, 100, 189
Bell v. New Jersey and Pa., 211, 212
Bellevue Pub. School Dist. No. 405 v. Benson, 18
Benavides Indep. School Dist. v. Guerra, 28
Benoit, Inc. v. District Bd. of Trustees, 193
Bennett v. Kentucky Dep't of Educ., 211
Bennett v. New Jersey, 211
Benton v. Board of Educ., 15
Berger v. Independent School Dist. No. 706, 24
Berger v. State, 156
Bevli v. Brisco, 252
Bey v. Board of Educ., 19
Bielaska v. Town of Waterford, 153, 189
Big Beaver Falls Area School Dist. v. Big Beaver Falls Educ. Ass'n, 53
Big Spring School Dist. v. Hoffman, 109
Binder, *In re*, 265
Bismarck Pub. Schools v. Walker, 75, 178
Bitterman v. Emory Univ., 194
Black v. Board of Revision of Cuyahoga County, 182, 215
Black v. University of Iowa, 247
Blackshear v. Bethune Cookman College, 276
Blanchard v. Lansing Community College, 247
Blank v. Independent School Dist., 25
Blazejewski v. Board of Educ. of Allegany Cent. School, 136
Blog v. McKeesport Area School Dist., 19
Board of Control of Ferris State College v. Michigan AFSCME, 259
Board of Coop. Educ. Serv. v. BOCES II Teachers Ass'n, 49
Board of Educ. v. Auburn Teachers Ass'n, 58
Board of Educ. v. Dowling, 25
Board of Educ. v. Greene, 183
Board of Educ. v. Human Rights Comm'n, 6
Board of Educ. v. Jennings, 27
Board of Educ. v. L.R. Foy Constr. Co., 188
Board of Educ. v. Lexington-Fayette Urban County Gov't, 184
Board of Educ. v. Local 818, AFSCME, 54, 55
Board of Educ. v. McCall, 6
Board of Educ. v. Regional Bd. of School Trustees, 179
Board of Educ. v. Rowley, 130
Board of Educ. v. Savino, 31
Board of Educ. v. Sickley, 19
Board of Educ. v. Slack, 184
Board of Educ. v. State, 182
Board of Educ. v. State Div. of Human Rights, 6
Board of Educ. v. The Architects, Taos, 189
Board of Educ. v. Thompson Constr. Corp., 186
Board of Educ. v. Wolff, 19
Board of Educ. v. Yonkers Fed'n of Teachers, 48
Board of Educ., Erie County School Dist. v. Rhodes, 203
Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 105
Board of Educ. of Boonton v. Kramer, 37
Board of Educ. of Fayette County v. Lexington-Fayette Urban County Gov't, 221
Board of Educ. of New Haven v. AFSCME Council 4, 52
Board of Educ. of N.Y. v. Ambach, 124
Board of Educ. of Philadelphia v. Federation of Teachers Local No. 3, 50
Board of Regents v. Board of Trustees, 192
Board of Regents v. NCAA, 192
Board of Regents v. Roth, 14
Board of Regents of La. v. Board of Trustees, 228
Board of School Directors v. Ashby, 24
Board of Trustees v. Gates, 10
Board of Trustees v. Mississippi Publishers Corp., 192, 230
Board of Trustees of Univ. of Ill. v. Human Rights Comm'n, 244
Bob Jones Univ. v. United States, 268
Bobby B., *In re*, 92
Bochner v. Providence School Comm., 230

Bodanza v. Public Employment Relations Bd., 258
Boddie v. Connecticut, 13
Bodker v. Louisiana State High School Athletic Ass'n, 89
Bogguess v. Board of Educ. of Rock Island School Dist. No. 41, 59
Boltax v. Joy Day Camp, 162, 163, 190
Bonadonna v. Cooperman, 123, 127, 134, 137
Bonar v. Ambach, 136
Bond v. Keck, 111
Borgen v. Anderson, 260
Borough of W. View, *In re*, 183
Bourland v. Commission on Professional Competence, 18
Bowman v. Bethel-Tate Bd. of Educ., 104
Box Butte County Bd. of Equalization, *In re*, 182
Boyd v. Board of Directors of McGehee School Dist. No. 17, 89
Boyle v. Board of Trustees, 21
Bradley v. Milliken, 116, 117
Bradshaw v. Southern Fulton School Dist., 182, 219
Braintree Baptist Temple v. Holbrook Pub. Schools, 78
Brandhorst v. Special School Dist. No. 1, 24
Braught v. Board of Educ., 27
Breen v. Runkel, 98
Brennan v. Vinton County Local School Dist. Bd. of Educ., 29
Breslin v. School Comm. of Quincy, 23, 26
Breuhan v. Plymouth-Canton Community Schools, 31, 32
Brewer v. Austin Indep. School Dist., 105, 106
Brinkman v. Gilligan, 113
Bristol Township School Dist. v. Karafin, 24
Britt v. Rogers, 73
Britton v. South Bend Community School Corp., 5
Brock v. Georgia Southwestern College, 241
Brown Univ. in Providence v. Kirsch, 191, 278
Brown v. California State Personnel Bd., 251
Brown v. North Dakota State Univ., 247
Brown v. Red River Parish School Bd., 22, 169
Bryan v. Alabama State Tenure Comm'n, 30
Buchheit v. Hamilton City Bd. of Educ., 11
Buian v. Baughard, 120
Burdick v. Independent School Dist. of Okla. County, 72
Burkett v. United States Dep't of Agriculture, 266
Burlington School Comm. v. Department of Educ., 124, 128, 129, 130, 134
Burrows Constr. Co. v. Independent School Dist. No. 2, 188
Burt v. Board of Educ., 178
Burt v. Board of Regents, 191
Burt v. Duval County School Bd., 50, 53
Busby School of the Cheyenne Tribe v. United States, 184
Bush v. State Bd. of Educ., 22
Butts v. National Collegiate Athletic Ass'n, 282
Bybee, *In re*, 263
Bykofsky v. Hess, 257
Byrnes v. Mecosta-Osceola Intermediate School Dist., 11, 56

Cabarga-Cruz v. Fundacion Educativa Ana G. Mendez, Inc., 254
Cahill v. Board of Educ. of City of Stamford, 170
Cain v. Yukon Pub. Schools, 130
California Casualty Ins. Co. v. David Douglas School, 166, 176
California School Employees Ass'n v. Compton Unified School Dist., 14
California Teachers Ass'n v. Board of Educ., 27
California Teachers Ass'n v. Governing Bd. of the Yosemite Community College Dist., 255
Campbell v. Board of Educ., 30, 171
Campus Communications, Inc. v. Department of Revenue, 230
Canajoharie Cent. School Dist. v. Canajoharie United School Employees, 66
Candid Enters., Inc. v. Grossmont Urban High School Dist., 181
Cannon v. University of Chicago, 262
Cannon v. Loyola Univ. of Chicago, 262
Cannon v. University of Health Sciences/Chicago Medical School, 262
Capac Bus Drivers Ass'n v. Capac Community Schools Bd. of Educ., 45
Cape v. Howell Bd. of Educ., 177
Capobianco v. Ambach, 177

Carey v. Piphus, 100
Carey v. Population Services Int'l, 12
Carlson v. Highter, 191, 278
Carlstrom v. Washington, 259
Carr v. Indian Lake School Dist., 152, 190
Casey v. Tieman, 160
Cashel v. Regents of the Univ. of Mich., 230
Caso v. School Comm. of Waltham, 26
Catanzaro v. Wasco Prods., 190
Catholic High School Ass'n v. Culvert, 38
Cavazos v. United States, 157, 158
Cavello v. Sherburne-Earlville Cent. School Dist., 156
Central Baptist Theological Seminary, *In re*, 193
Chandler v. Perry-Casa Pub. School Dist. No. 2, 28
Chang v. University of R.I., 233, 234, 235, 241
Charles Schreiner Bank v. Kerrville Indep. School Dist., 218
Chartiers Valley School Dist. v. Virginia Mansions Apartments, 182, 218
Chavez v. Regents of the Univ. of N.M., 192
Chen v. Wharton, 246
Chester v. Gilchrist, 181
Childers v. Morgan County Bd. of Educ., 29
Chism v. University of Kan., 272
Christiansburg Garment Co. v. EEOC, 137
Christy v. Board of Educ., 20
Chula Vista City School Dist. v. Bell, 213
Ciccarelli v. Board of Educ., 18
Citizens for an Orderly Energy Policy v. County of Suffolk, 176
Citizens of Otto v. Wyoming State Comm. for School Dist. Org., 179
Citizens Savings Bank v. Bell, 267
Citizens Utils. Co. v. Illinois Pollution Control Bd., 182
City of Detroit v. Alsip, 182
City of Newport v. Cocke County, 184
Civil Rights Div. v. Amphitheater Unified School Dist. No. 10, 7
Civil Rights Div. v. Superior Court, 7
Clark v. Marengo County, 177
Clarke v. Board of Educ., 18
Clayton v. Trustees of Princeton Univ., 271
Clements v. Board of Educ. of Decatur, 107
Clemson Corp. v. McKeesport Area School Dist., 176
Cleveland Bd. of Educ. v. Armstrong World Indus., 186
Cleveland Bd. of Educ. v. Loudermill, 13, 26
Clinton School Dist. v. Byrd, 107
Coast to Coast Mfg. v. Carnes Constr. Inc., 188
Cobleskill Cent. School Dist. v. Newman, 63
Corcoran v. Community School Dist., 157
Collins v. Bossier Parish School, 150
Collins v. School Bd., 151
Commco, Inc. v. Amelkin, 180
Commonwealth v. Johnson, 32
Commonwealth v. Miller, 32
Commonwealth v. State Schools and Hosp. Fed'n of Teachers, Local 1830, 58
Community Consol. School Dist. No. 59 v. United States Fidelity and Guar. Co., 187
Compton Community College Fed'n of Teachers v. Compton Community College Dist., 259
Computronics, Inc. v. Apple Computer Inc., 192
Connecticut Ass'n of Bds. of Educ. v. Shedd, 60, 63
Connecticut Educ. Ass'n v. State Bd. of Labor Relations, 26, 45, 62
Connecticut State College AAUP v. State Bd. of Labor Relations, 259
Connell v. Board of Educ., 21
Connell v. St. Francis Monastery, 191
Connick v. Myers, 10
Cook County College Teachers Union v. Board of Trustees of Community College Dist. No. 508, 258
Cook v. Board of Educ., 30
Cook v. Clark, 179
Cope v. Board of Educ., 16, 19
Copiague Union Free School Dist. v. Copiague Teachers Ass'n, 49
Copper River School Dist. v. Alaska, 209
Corcoran v. Community School Dist. 17, 157
Cornelius v. NAACP Legal Defense Fund, 102
Cornell Univ. v. Bagnardi, 193, 231
Corstvet v. Boger, 251
Cortez v. Independence County, 193, 230
Cotrona v. Johnson & Wales College, 194
Cottonwood Gulch Found. v. Gutierrez, 182

Couch v. Turlington, 33
Council for the Hearing Impaired v. Ambach, 143
Council Rock School Dist. v. G.D.L. Plaza Corp., 181
Country Hills Christian Church v. United States School Dist. No. 512, 36
County College of Morris Staff Ass'n v. County College of Morris, 260
County of Erie Appeal, *In re*, 42
Cowden, *In re*, 25
Crump v. Durham County Bd. of Educ., 19
Culver-Stockton College v. Missouri Power and Light Co., 193, 281
Cumberland School Comm. v. Harnois, 83, 178
Cumero v. Public Employment Relations Bd., 37

Dade County School Dist. v. Johns-Manville Corp., 186
Dale County Bd. of Educ. v. Daleville City Bd. of Educ., 182
Dale v. Zoning Hearing Bd. of Tredyffrin Township, 193, 231
Daly v. Three Village Cent. School Dist., 6
Dauel v. Board of Trustees of Elgin Community College, 249
Daugherty v. Hunt, 22
Daul v. Board of Educ., 27
David D. v. Dartmouth School Comm., 131, 140, 141
Davis v. Alabama State Univ., 257
Davis v. Churchill County School Bd. of Trustees, 106, 177
Davis v. Duncanville Indep. School Dist., 184
Davis v. Owen, 253
Davis v. School Dist. of Philadelphia, 161
Davison v. Board of Trustees of C. Sandburg College, 247
Day v. South Park Indep. School Dist., 10
Dayton Bd. of Educ. v. Brinkman, 113
Debrow v. Alabama State Tenure Comm'n, 32
Dehnert v. Arrow Sprinklers, Inc., 188
DeKalb County School Dist. v. Bowden, 190
Delconte v. North Carolina, 78
Dempsey v. City Univ. of N.Y., 277
Dennis v. Dobbs, 257
Department of Educ. v. Katherine, 128
Department of Labor v. Titan Constr. Co., 185
Department of Revenue v. New Life Fellowship, 182
Department of State Lands v. Pettibone, 175
Derry Township School Dist. v. Day & Zimmerman, Inc., 186
Derry Township School Dist. v. Finnegan, 25
DeSimone v. Board of Educ., 13, 15, 26
Diamond v. McKenzie, 126, 131, 136
Dillon County School Dist. No. 2 v. Lewis Sheet Metal Works, 186
Dinnan, *In re*, 246
District of Columbia v. Trustees of Amherst College, 193
Dolan v. Garden City, 152
Dominguez v. Babcock, 248
Donnelly v. Carmel Cent. School Dist., 16
Donnybrook Pub. School Dist. No. 24, *In re*, 179
Donohue v. Copiague Union Free School Dist., 280
Donovan v. Georgia Southwestern College, 241
Dowell v. Board of Educ. of Okla. City, 119
Downie v. Independent School Dist. No. 141, 18
Doyle, *In re*, 18
Dozier v. Loop College, City of Chicago, 266
Draganosky v. Minnesota Bd. of Psychology, 244
Dristy v. Waterford School Dist., 158, 190
Duluth Fed'n of Teachers v. Independent School Dist., 24
Dunne v. Orleans Parish School, 154, 190
Dunnigan v. Ambach, 19
Duro v. District Attorney, 78
Dutchess County Bd. of Coop. Educ. Serv. v. Dutchess County Bd. of Coop Educ. Serv. Faculty, 50, 53

Easley v. University of Mich. Bd. of Regents, 272
East Lake Fork Special Drainage Dist. v. Village of Iversdale, 193
Eastern N.Y. Youth Soccer Ass'n v. New York State Pub. High School Athletic Ass'n, 88
Eckles, *In re*, 265
Edelman v. Jordan, 139

Edge v. Sumter County School Dist., 177
Edward Vantine Studios v. Fraternal Composite Serv., 192
EEOC v. Franklin and Marshall College, 245
EEOC v. McCarthy, 241
EEOC v. University of Notre Dame Du Lac, 246
EEOC v. University of Okla., 243
Eiseman v. State, 275
Elbe v. Yorkton Indep. School Dist. No. 63-3, 84
Elias v. Youngken, 257
El Camino Community College Dist. v. Superior Court of Cal., 192, 277
El Paso County Community College Dist. v. City of El Paso, 184
Elkhorn Area School Dist. v. East Troy Community School Dist., 183
Elliott v. University of Tenn., 235
Ellis v. O'Hara, 78
Elview Constr. Co. v. North Scott Community School Dist., 185
Ende v. Board of Regents of Regency Univs., 241, 242
Engel v. Vitale, 98
Equal Employment Opportunity Comm'n v. Fox Point-Bayside School Dist., 8
Eshom v. Board of Educ., 19
Eureka County School Dist Bd. of Trustees v. Holbo, 14, 28
Evans v. Detroit Bd. of Educ., 153, 190
Everson v. Board of Educ., 96
Ewing v. Board of Regents of the Univ. of Mich., 271
Exeter-West Greenwich Regional School Dist. v. Exeter-West Greenwich Teachers' Ass'n, 44, 64, 223, 224
Expressway Village, Inc. v. Brearly, 182
Exton Dev. *In re*, 182
Exxon Co. v. Township of Livingston, 180

Fain v. Brooklyn College of CUNY, 269
Faison v. New Hanover County Bd. of Educ., 31
Fallin v. Maplewood-North St. Paul Dist., 151
Farrell Area School Dist. v. Deiger, 3, 4
Fassett v. Poch, 194
Fenstra, *In re*, 265
Fellowship Baptist Church v. Benton, 76
Felton v. Aguilar, 95
Felton v. Secretary, United States Dep't of Educ., 198
Ferdinand v. Hamilton Local Bd. of Educ., 14, 23
Ferguson v. DeSoto Parish School Bd., 150
Ferrara v. Mills, 10
Finley v. Bass, 167
Finley v. Independent School Dist., 22
Fiorentino v. Department of Admin., Div. of Retirement, 255
Fisher v. Fairbanks N. Star Borough School Dist., 9
Fishman v. Clancy, 10, 11
Five Towns College v. Citibank, N.A., 281
Fleischer v. Board of Community College Dist. No. 519, 252
Fleming v. Moore, 191
Florida v. Buckner, 79
Flowing Wells School Dist. v. Vail School Dist., 75
Fontana Unified School Dist. v. City of Rialto, 181
Ford v. Stone, 247
Foreman v. Continental Causality Co., 167
Frame v. South Bend Community School Corp., 84, 178
Franceski v. Plaquemines Parish School Bd., 14, 17
Franklin v. Leland Stanford Junior Univ., 250
Fraser v. Bethel School Dist. No. 403, 102
Frazier Assoc. Mfrs. Reps., Inc. v. Dabbs & Stewart, 188
Freer Mun. Indep. School Dist. v. Manges, 216
Fry v. Commonwealth, 25
Fusilier v. Northbrook Excess & Surplus Ins. Co., 154, 190
Fussell v. Louisiana Business College of Monroe, Inc., 279

Gaetjens, *In re*, 19
Gaines v. Daugherty County Bd. of Educ., 121
Galda v. Bloustein, 267
Galda v. Rutgers, 267, 268
Gallison v. Briston School Comm., 25
Garcia v. Board of Educ. of Soccorro Consol. School Dist., 169
Garcia v. Guerra, 177
Garcia v. Los Angeles Unified School Dist., 161
Garcia v. State Bd. of Educ., 32
Gardner v. Commission on Professional Competence, 19

Gardner v. School Dist. No. 55, 14, 27, 171
Garrett v. Grant Street Dist. No. 124, 190
Garthwright v. Lincoln Ins. Co., 148
Gaspersohn v. Harnett County Bd. of Educ., 109, 168
Gault, *In re*, 81
Gay Rights Coalition v. Georgetown Univ., 269
Gay Student Servs. v. Texas A.&M. Univ., 269
Geis v. Board of Educ. of Parsippany-Troy Hills, 131, 140, 141
General Drivers, Warehousemen & Helpers v. Riss & Co., 56
Gentile v. MacGregor, 172, 173
Georgia Farm Bureau Mutual Ins. Co. v. Greene, 166
Georgia NAACP v. Georgia, 110
Gertler v. Goodgold, 253
Giammario v. Trenton Bd.of Educ., 7, 66
Giampa v. Commonwealth, 8, 12
Gibson County Special School Dist. v. Palmer, 182
Gibson v. Board of Educ., 175
Givhan v. Western Lines Consol. School Dist., 10
Glover v. Cole, 268
Glover v. School Bd., 21
Gold Coast Mall v. Larmar Corp., 50
Goldman, *In re*, 265
Goldrich, *In re*, 265
Gomez v. City of N.Y., 190
Gomez v. Illinois Bd. of Educ., 82
Goodman v. Gallerano, 246
Gordon J. v. Santa Ana Unified School Dist., 92
Gordy v. Cobb County School Dist., 180
Goss v. Lopez, 105
Governing Bd. v. Commission on Professional Competence, 19
Gradco, Inc. v. St. Clair County Bd. of Educ., 187
Graham v. Central Community School Dist. of Decatur, 100
Grain Dealers Mutual Ins. Co. v. Porterfield, 189
Grand Island Cent. School Dist. v. Transcom Equip. Corp., 189
Grand Rapids Pub. Schools v. City of Grand Rapids, 182
Grand Rapids School Dist. v. Ball, 94, 189, 196, 197, 198
Grandinetti v. Commonwealth Unemployment Compensation Bd. of Review, 64
Granville Cent. School Dist. v. Granville Non-Instructional Employees Ass'n, 52, 54
Gray v. Board of Higher Educ., CUNY, 246
Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Educ. Ass'n, 41, 50
Green Forest Pub. Schools v. Herrington, 22
Green v. County School Bd. of New Kent County, 115, 116, 119
Greenville Indep. School Dist. v. B&J Excavating, Inc., 188
Greenwell v. Walters, 274
Greenwich Cent. School Dist. v. Ambach, 29
Griggs v. Duke Power Co., 3, 67
Grounds v. Tolar Indep. School Dist., 29
Grove v. Mead School Dist. No. 354, 98
Grove City v. Bell, 242
Guardians Ass'n v. Civil Serv. Comm., 110
Guilfoose v. New York State Agriculture Experiment Station, 243
Guyton v. Roundy, 150
Gwinn Area Community Schools v. Michigan, 213

Hahnemann Univ. v. District 1199C, Nat'l Union of Hosp. and Health Care Employees, 260
Hall v. Vance County Bd. of Educ., 130
Hamburg v. North Penn School Dist., 19
Hanlon v. Board of Educ., 15, 16, 19, 25, 26
Harden v. Adams, 250
Hardy v. University Interscholastic League, 88
Hargrove v. Minuteman Regional Vocational Technical School Dist., 180
Harper Creek School Dist. v. Leroy Township Supervisor and Assessor, 182
Harris v. School Annual Pub. Co., 170
Harris v. State Personnel Bd., 257
Harrisburg Hosp. v. Thornburgh, 192, 231
Haug v. Franklin, 270
Hawkeye Bancorporation v. Iowa College Aid Comm'n, 267
Hayes v. Reorganized School Dist. No. 4, 176

Hein v. Board of Educ., 22
Helms v. Independent School Dist. No. 3, 142
Hempstead Classroom Teachers Ass'n v. Board of Educ., 54
Henix v. George, 151
Hensley v. Eckerhart, 120
Heritage Enters. v. City of Corvallis, 193
Heywood v. Thompson School Dist. R2-J, 10, 11
Hibbing Educ. Ass'n v. Public Employees Relation Bd., 40
Higgins v. East Valley, 148
Hindman v. Teague, 175
Hines v. Board of Educ., 176
Hitt v. Mabry, 177
Hoefer v. Sioux City Community School Dist., 176
Hoferek v. University of Mo., 236
Hoffman v. Board of Educ. of the City of N.Y., 280
Hofstra Univ. v. Boslet, 193
Holland v. Board of Educ., 22
Holland v. Yankton School Dist. 63-3, 165, 190
Holley v. Seminole County School Dist., 11, 16, 18
Holy Angels Academy v. Hartford Ins. Group, 176
Honig v. Students of the Cal. School for the Blind, 191
Hooksett School Dist., *In re*, 67
Hooper v. Jensen, 253
Hooten v. Pennsylvania College of Optometry, 236
Horton v. Marshall Pub. Schools, 71
Horton v. Meskill, 202, 203
Howard County Bd. of Educ. v. Howard County Educ. Ass'n, 50
Howard Univ. v. Best, 247
Hudson Properties Co. v. Governing Bd., 183
Humphries v. Lincoln Parish School Bd., 89

Ikpeazu v. University of Neb., 272
Illinois Inst. of Technology v. Rosewell, 193
Immigration and Naturalization Serv. v. Lopez-Mendoza, 92
Independent School Dist. No. 14 v. AMPRO Corp., 148, 155, 176
Inglett v. Louisiana Power & Light Co., 190
Integrated Dev. & Mfg. Co. v. University of Minn., 192, 277
International Bhd. of Teamsters v. United States, 234
International Food & Beverage Systems v. City of Fort Lauderdale, 180
International Shoe Co. v. Washington, 229
Iowa State Educ. Ass'n v. Public Employment Relations Bd., 60, 63
Irving Indep. School Dist. v. Tatro, 138
Isaac v. Harvard Univ., 236
Issaquah Educ. Ass'n v. Issaquah School Dist. 411, 28

Jaar v. University of Miami, 192, 275
Jackson v. Franklin County School Bd., 125, 133
Jackson v. Hayakawa, 269
Jackson v. State, 190
Jacobs v. Fremont Re-1 School Dist., 20
Jaden Elec. Div. of the Farfield Co. v. Wyoming Valley W. School Dist., 188
Jaffree v. Board of School Comm'rs of Mobile County, 96
Jaffree v. Wallace, 96
Jaksa v. Regents of the Univ. of Mich., 270
James v. Howe Military School, 85
Jamestown School Comm. v. Schmidt, 83
Janesville Community Day Care Center v. Spoden, 183
Jansson v. Fairleigh Dickinson Univ., 194
Jarman v. Williams, 103, 189
JATT Title Holding Corp. v. Roberts, 182
Jawa v. Board of Educ., 28
Jennings v. Dumas Pub. School Dist., 29
Jepsen v. Florida Bd. of Regents, 240
Jester v. Board of Educ., 26
Jeter v. Alabama State Tenure Comm'n, 16, 19
John Grace & Co. v. State Univ. Constr. Fund, 193
John H. v. Brunnelle, 141
John K., *In re*, 130, 138
Johnson v. Charles City Community School Bd., 22
Johnson v. Educational Testing Serv., 263
Johnson v. Georgia Highway Express, Inc., 120
Johnson v. Lincoln Univ. of the Commonwealth Sys. of Higher Educ., 250
Johnson v. Pennsylvania State Univ., 194

Jonas v. Town of Colonie, 193, 231
Joner v. Board of Educ., 161, 190
Jones v. Brevard County School Bd., 108
Jones v. Louisiana, 273
Jones v. Palm Springs Unified School Dist., 15, 20
Jones v. Wrangell School Dist., 48, 54
Joshi v. Florida State Univ. Health Center, 237
J.R. Stevenson Corp. v. Dormitory Auth., 193
Julio, R., *In re*, 81

Kahn v. Trustees of Columbia Univ., 256
Kanaly v. State, 191, 229
Kaplan v. Board of Educ., 176
Karmanos v. Baker, 282
Karp v. University of N.C., 194
Kay v. Bruno, 194
Keefer v. State Farm Fire and Casualty, 159, 160
Kelleher v. Flawn, 248
Kellerman v. Board of Educ., 31
Kelley v. Metropolitan County Bd. of Educ., 114, 120, 178
Kelly v. Employment Div., 255
Kelly v. Iowa State Educ. Ass'n, 169
Kenai Peninsula Borough Bd. of Educ. v. Brown, 19
Kennedy v. Board of Educ., McDowell County, 74
Kennett v. City of Nashua, 192
Kent County Educ. Ass'n v. Wyoming Bd. of Educ., 184
Kentucky Dep't of Educ. v. Secretary of Educ., 211
Kenyatta v. Moore, 274
Keyes v. School Dist. No. 1, 110, 116
King v. Board of Educ., 28
King v. Sununu, 204
King v. University of Minn., 252
Kinglon, *In re*, 255
Kipp v. Juniata County School Dist., 29
Klein v. Trustees of Ind. Univ., 236
Klejmont v. Washingtonville, 164
Kling v. County of Los Angeles, 143, 262
Knapp v. Whitaker, 11
Koppi v. Board of Control, 23
Kovats v. Rutgers, 246
Kraft v. William Alanson White Psychiatric Found., 272
Krales v. City Univ. of N.Y., 194
Kramer v. Horton, 252
Kuchenski v. Kramer Sheet Metal, 188
Kuehn v. Renton School Dist. No. 403, 93
Kufferman v. Fairfield Univ., 193
Kuhlmeier v. Hazelwood School Dist., 104
Kumar v. Board of Trustees, Univ. of Mass., 247
Kumley v. Polk County Dist. Boundary Bd., 179

Laclede School of Law, *In re*, 192
Laguna Village, Inc. v. County of Orange, 181
Lakeridge Dev. Corp. v. Travis County Water Control and Improvement Dist. No. 18, 217
Lamarre v. Granville Cent. School, 8
Lamont X v. Quisenberry, 133
Lamphere v. Brown Univ., 244
Lampson v. South Park Indep. School Dist., 183
Landry v. Jefferson Davis Parish School Bd., 152, 190
Lansing School Dist. v. Lansing School Educ. Ass'n, 59
Lantz v. Ambach, 89
LaPointe v. John K., 209, 210
Latino Political Action Comm. v. City of Boston, 177
Laughlin v. School Dist. No. 1, 208
Laura Baker School Ass'n v. Department of Human Servs., 176
Lavender v. McDowell County Bd. of Educ., 29
LaVerne v. University of Tex. Sys., 246
Lau v. Nichols, 82
Law v. Rochester School Dist., 164, 190
L.E. Zannini & Co. v. Board of Educ., 185
Leander Indep. School Dist. v. Texas Conference Ass'n of Seventh Day Adventists, 216
Lebensbaum v. Adelphi Univ., 244
Leechburg Area School Dist. v. Dale, 55, 57
Lemon v. Kurtzman, 11, 94, 95, 96, 97, 99, 100, 101, 197, 273
Leray v. Mullican, 177
Levitt v. Monroe, 251
Levitt v. University of Tex. at El Paso, 251
Lewis v. Millsaps College, 242
Liddell v. Board of Educ., St. Louis, 112, 113, 179
Liddel v. Missouri, 113
Lifson v. Board of Educ., 31
Litka v. University of Detroit Dental School, 272

Littlejohn v. Rose, 12
Little Rock School Dist. v. Pulaski County Special School Dist., 114, 179
Local Union No. 501, IBEW v. NLRB, 185
Logan v. Armstrong, 183
Long v. LaFourche Parish School Bd., 31
Longenecker v. Turlington, 33
Louisiana Business College v. Crump, 266
Louisiana Tax Collections, Inc. v. Bear Creek Storage Co., 182
Love v. Alabama Inst., 4, 6
Love v. Alamance County Bd. of Educ., 4, 6
Love v. Special School Dist., 3, 4
Lowe v. Beaty, 248
Loyd v. Keathley, 177
Lujan v. Franklin County Bd. of Educ., 4
Luna, *In re*, 265
Lundberg v. Board of Educ., 28
Lupert v. California State Bar, 272
Lutheran High School Ass'n v. City of Farmington Hills, 180
Lyford v. Schilling, 238
Lyons v. Labor Relations Comm'n, 52

Mabry v. State Bd. for Community Colleges, 242
MacMurray College v. Schiesser, 264
Maddox v. Boutwell, 109
Maddox v. St. Paul School Dist., 28
Madison Area Educ. Special Serv. Unit v. Indiana Educ. Employment Relations Bd., 40
Mahoney v. Board of Trustees of San Diego Community College Dist., 252
Maine v. McDonough, 80
Manchester Township Bd. of Educ. v. Thomas P. Carney, Inc., 189
Mandare v. W.S. LaFargue Elementary School, 7
Manecke v. School Bd. of Pinellas County, Fla., 135
Manley v. Wichita Business College, 192, 279
Marana Unified School Dist. No. 6 v. Aetna Casualty and Sur. Co., 185
March v. Arthur, 117
Market Square Properties v. Town of Guilderland Zoning Bd. of Appeals, 180
Marshall County Bd. of Educ. v. City of Albertville, 179
Marshall County Cent. Educ. Ass'n v. Independent School Dist. No. 441, 21, 54
Marshall v. Georgia Southwestern College, 241
Martell v. Teachers' Retirement Bd., 61
Martens v. District No. 220, 93
Martin v. School Comm., 22
Martin v. School Comm. of Natick, 23
Martin v. Lou Poliquin Enters., 176
Massachusetts Inst. of Technology v. AB Fortia, 191
Martinez v. Anchorage School Dist., 21
Martinez v. Board of Educ. of Taos Mun. Schools, 145
Martinez v. Bynum, 70
Martinson v. University of Minn., 255
Martori Brothers Distributors v. Agricultural Labor Relations Bd., 172
Massie v. University of Fla., 276
Maxey v. Board of Zoning Appeals, 180
May v. Cooperman, 97
May v. Evansville-Vanderburgh School Corp., 9, 11, 189
Mazanec v. North Judson-San Pierre School Corp., 79
McAdoo v. Toll, 239
McAndrew v. School Comm., 28
McCall v. Batson, 176
McCarthy v. Hornbeck, 200
McClain Co. v. Page & Wirtz Constr. Co., 188
McClure v. Mexia Indep. School Dist., 7
McConnel v. Howard Univ., 251
McDaniel v. Clarkstown Cent. School Dist. No. 1, 167
McDaniel v. Temple Indep. School Dist., 4, 6
McDonald v. School Bd. of Yorkton Indep. School Dist. No. 1, 84
McDonald v. State, 159
McDonnell Douglas Corp. v. Green, 3
McDonough v. Ney, 81
McEntire v. Brevard County School Bd., 108
McFarland v. Joint School Dist. No. 365, 183
McGuire v. Governing Bd. of San Diego Community College Dist., 249
McHale v. Cornell Univ., 281
McInnis v. Town of Tewksbury, 154, 190
McKenzie v. Smith, 130, 137
McLaurin v. Fischer, 243
McNeal v. Tate County School Dist., 110
Mead v. Nassau Community College, 194, 275

Medford Assembly of God v. City of Medford, 180
Meek v. Pittinger, 95, 96
Meiners v. Bering Strait School Dist., 178
Merkwan v. State, 191, 229
Merrill v. Board of Architect Examiners, 187
Merrins v. Honeoye Teachers' Ass'n, 57
Merwine v. Board of Trustees for State Inst., 238
Meyers v. Medford Lakes Board of Educ., 156
Michael C., *In re*, 142
Michael G., *In re*, 81
Miener v. Special School Dist. of St. Louis County, 137, 138
Miller v. Lindenwood Female College, 260
Miller v. Rutgers Univ., 194
Milliken v. Bradley, 114
Mills v. Buell, 88
Missouri Nat'l. Educ. Ass'n v. New Madrid County R-1 Enlarged School Dist., 11
Missouri NEA v. Missouri State Bd. of Mediation, 39
Mitchell v. Board of Educ., 177
Mitchell v. Board of Trustees of Oxford, 108
Mitchell v. State, 225
Moire v. Temple Univ. School of Medicine, 272
Molthan v. Temple Univ., 253
Mondragon v. Poudre School Dist. R-1, 16, 19
Mooney v. North Pa. School Dist., 152
Morgan v. Nucci, 115, 178
Morgan v. Polk County Board of Educ., 80
Morley v. Arricale, 32
Moriarty v. Rutter, 176
Morrison v. Salida School Dist., 10
Morrissey v. Board of Educ. of Naugatuck, 164
Mott v. Endicott School Dist. No. 308, 18
Moyse v. Runnels School, Inc., 85
Mozert v. Hawkins County Pub. Schools, 99
Mt Healthy City School Dist. Bd. of Educ. v. Doyle, 10, 145
Mulligan v. Hazard, 249
Mullins v. Kiser, 21
Muncey Area School Dist. v. Gardner, 148, 185
Murray v. LeRoy Cent. School Dist., 187
Musorofiti v. Board of Educ., 26

NAACP v. Alabama, 42
NJAC, *In re*, 142
NLRB v. Lewis Univ., 258
NLRB v. Yeshiva Univ., 258
Namenwirth v. Board of Regents of the Univ. of Wis. Sys., 238
Nash v. Auburn Univ., 271
National Coal Ass'n v. Hodel, 192
National Coalition for Pub. Educ. and Religious Liberty v. Harris, 95
National Collegiate Athletic Ass'n v. Johns Hopkins Univ., 282
National Collegiate Athletic Ass'n v. Tucker, 282
Nebraska School Dist. No. 148 v. Lincoln Airport Auth., 183
Neis v. Board of Educ., 183
Neldare v. Board of Supervisors of Southern Univ., 276
Nell Holcomb Reorg. School Dist. No. R-4 v. Jackson Reorg. School Dist. No. R-2, 182
Nesson v. Board of Educ., 31
Neumarkel v. Allard, 30
Newberry College v. Southern Carolina Employment Sec. Comm'n, 254
Newbury Junior College v. Town of Brookline, 194, 232
Newby v. Lake Zurich Community School, 155, 190
New City Jewish Center v. Flagg, 183
New Jersey v. T.L.O., 90, 91, 92, 93
New Jersey Election Law Enforcement Comm'n v. Brown, 177
Newsome v. Farer, 192
Neyland v. Board of Educ., 21
Niagara Mohawk Power Corp. v. Town of Onandaga, 216
Norcross v. Sneed, 8, 144
Norristown Area School Dist. v. A.V., 108
North Haven v. Bell, 242
North Jersey Secretarial School, Inc. v. National Ass'n of Trade and Technical Schools, 176, 232
North v. West Va. Bd. of Regents, 270
Northeast Parent & Child Society v. City of Schenectady Indus. Dev. Agency, 180
Northeastern Educ. Intermediate Unit No. 19 v. Pennsylvania, 206
Nova Univ. v. Educational Inst. Licensure Comm'n, 191, 232
Nyack Bd. of Educ. v. K. Capolino Design and Renovation, Ltd., 189

Nydegger v. Don Bosco Preparatory High School, 157

Oak Ridge City Schools v. Anderson County, 220
Oake v. Collin County, 182
O'Connor v. Peru State College, 247
Ocosta School Dist. No. 172 v. Brouillet, 204
Off-Street Parking Dev. Dist. No. 1. v. City of Fayetteville, 193
Okeson v. Tolley School Dist. No. 25, 15
Old Bridge Bd. of Educ. v. Old Bridge Educ. Ass'n, 60
Ollman v. Evans, 245
Opie v. Denver Classroom Teachers Ass'n, 42
Opinion of the Justices, *In re*, 182
Oregon School Employees Ass'n, Chapter 115 v. Pendleton School Dist., 17
Orleans Parish School Bd. v. City of New Orleans, 181
Oscar Mayer & Co. v. Evans, 66
Osolo School Bldgs., Inc. v. Thorleif Larsen & Son of Ind., Inc., 187
Otis Elevator Co. v. Don Stodola's Well Drilling Co., 188
Overland Constructors Inc. v. Millard School Dist., 188

Pace v. Rebore, 170, 177
Pagano v. Board of Educ., 16
Page v. Madere, 178
Painters Local Union No. 164 v. Epley
Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior College, 259
Palmer v. District Bd. of Trustees of St. Petersburg Junior College, 238
Pande v. Johns Hopkins Univ., 240
Papasan v. United States, 175
Parks v. Pavkovic, 132, 206
Parraway v. Andrews Univ., 265
Pastor v. San Juan School Dist. No. 1, 28
Patterson v. Hunt, 271
Patterson v. Masem, 4, 6, 10
Pat v. Stanwood School Dist., 73
Patzer v. Board of Regents of Univ. of Wis. Sys., 235
Pavadore v. School Comm., 20
Payne v. Ballard, 14
Pedersen v. Joliet Park Dist., 149, 190
Pena v. Board of Educ. of City of Atlanta, 71, 72
Pennell v. Board of Educ., 25
Pennhurst State School and Hosp. v. Halderman, 82, 139, 140, 141
Pennsylvania Indus. for the Blind and Handicapped v. Commonwealth State Sys. of Educ., 191, 229
People *ex rel.* Shoepf v. Board of Educ., 12
Peoples Faith Chapel v. Limbach, 182
Pepe v. Somers Cent. School Dist., 164
Peper v. Princeton Univ. Bd. of Trustees, 66
Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 36, 102
Pesek v. Discepolo, 155
Pet, Inc. v. University of N.C., 192
Peter W. v. San Francisco Unified School Dist., 280
Peters v. Moses, 177
Peters Township School Dist. v. Peters Township Fed'n of Teachers, 62, 64
Petersen v. Board of Regents of the Regency Univ. Sys., 256
Petett v. Board of Educ., 23
Philadelphia Warehousing and Cold Storage v. Hallowell, 176
Philbrook v. Ansonia Bd. of Educ., 5
Phillips v. Anderson County, 184
Phillips v. Maurer, 184, 225
Phillips v. Plaquemines Parish School Bd., 20
Piarowski v. Illinois Community College, 245
Pickering v. Bd. of Educ., 10
Pier 30 Assocs. v. School Dist. of Philadelphia, 182, 219
Pierson v. Houston Indep. School Dist., 161
Pioneer Transp. Corp. v. Kaladjian, 178
Pisculli v. Board of Educ., 18
Pitts v. Freeman, 116, 179
Pittsburg Unified School Dist. v. California School Employees Ass'n, 38, 65
Plaisted v. Colorado Springs School Dist. No. 11, 164
Pleasant View Elementary School PTA v. Group 1 Defendants, 191
Plyler v. Doe, 70
Poitier v. School Bd., 190
Pollnow v. Glennon, 107
Pookman v. School Dist., 31
Popson v. Henn, 176, 224
Pordum v. State, 27
Prichard v. Board of Educ., 21
Prince George's County Educ. Ass'n v. Board of Educ. of Prince George's County, 58

Professional Staff Ass'n of Area Educ. Agency 12 v. Public Employment Relations Bd., 46
Profitt v. Wayne-Westland Community Schools, 44, 56
Prudential Ins. Co. of Am. v. Oak Park School Dist., 182
Pruessner v. Benton, 76
Public Employees Fed'n v. Division of Classification and Compensation, 24
Pugliese v. City of N.Y., 194
Pushay v. Walter, 84, 178, 200
Pyo v. Stockton State College, 239

Rabon v. Bryan County Bd. of Educ., 9
Ramsay v. Sierra Vista Unified School Dist., 31
Ramsdell v. North River School Dist., 73
Ray v. Organization of School Adm'rs and Supervisors Local 28, 43
Record v. Mill Neck Manor Lutheran School, 6
Regents of the Univ. of Cal. v. American Broadcasting Co., 192
Regents of the Univ. of Cal. v. Public Employment Relations Bd., 259
Regents of the Univ. of Mich. v. Ewing, 271
Regents of the Univ. of N.M. v. Armijo, 192
Regional School Dist. No. 4 v. United Pac. Ins. Co., 185
Reiter v. Center Consol. School Dist., 7
Reule v. Bismark Pub. School Dist., 159
Rhea v. Grandview School Dist., 154
RHM Assocs. v. Neshaminy School Dist., 182
Rice v. Lee, 155
Richmond v. Hahn, 171
Rike v. Commonwealth, 22
Ripley v. Stephens, 183, 217
Rippe v. Board of Educ., 25
Roberts v. Beecher Community School Dist., 23
Roberts v. Robertson County, 151
Roberts v. Van Buren Pub. Schools, 10, 11
Robideau v. South Colonie Cent. School Dist., 125
Robinson v. Board of Trustees of E. Cent. Junior College, 247
Robinson v. City of Bartlesville Bd. of Educ., 159, 190
Robinson v. Indianola Mun. Separate School Dist., 182
Robinson v. Regional Bd. of School Trustees, 179
Rock v. Central Square School Dist., 149
Rodgers v. Norfolk School Bd., 15, 16
Rogers v. Masem, 5, 14
Rollins v. Concordia Parish School Bd., 158
Rosen v. Montgomery County Intermediate Unit No. 23, 23
Rosenshein v. Board of Educ., 183
Ross v. Springfield School Dist. No. 19, 19
Rossi v. Pennsylvania State Univ., 256
Royster v. Board of Trustees, 14
Ruter v. Independent School Dist., 25
Rutherford Educ. Ass'n v. Board of Educ., 30

SAU No. 21 Joint Negotiating Team, *In re*, 40
Sabet v. East Va. Medical Auth., 247
Salisbury R-IV School Dist. v. Westran R-I School Dist., 182, 221
Salvador v. Bell, 243
Samora v. McCracken, 177
San Dieguito Union High School Dist. v. Rosander, 179
San Jose Teachers Ass'n v. Superior Court, 37
San Marcos Water Dist. v. San Marcos Unified School Dist., 184
San Ramon Valley Unified School Dist. v. Wheatley-Jacobsen, Inc., 187
Santa Rosa Junior College v. Workers' Compensation Appeals Bd., 276
Savercool, *In re*, 265
Sawyer v. State, 194, 274
Saxby v. Bibb County Bd. of Educ., 15, 16, 19
Schachter v. Tomaselli, 21
Schiffer v. Board of Educ., 18
Schimmel v. Board of Educ., 26
School Bd. of Polk County v. Polk Educ. Ass'n, 39
School Bd. of Prince Williams County, Va. v. Malone, 133, 134
School Bd. v. Fidelity Co. of Md., 185
School Comm. of Leominster v. Labor Relations Comm'n, 65, 68
School Comm. of Peabody v. International Union of Elec., Radio and Mach. Workers Local 294, 48
School Comm. of Westerly v. Westerly Teachers Ass'n, 65
School Comm. of Wilmington v. Town Accountant of Wilmington, 220
School Comm. v. Holbrook Educ. Ass'n, 48

School Comm. v. Massachusetts Dep't of Educ., 212
School Comm. v. Teachers' Retirement Bd., 21
School Dist. 16-R v. Peterson, 183
School Dist. No 4 v. Board of Personnel Appeals, 63
School Dist. No 5 v. South Carolina Dep't of Social Servs., 222
School Dist. of Lancaster v. Department of Educ., 205
School Dist. of Lancaster v. Pennsylvania, 205
School Dist. v. Allegheny County Bd. of Elections, 177
Schuck v. Board of Educ., 21
Schwartz v. County of Nassau, 209
Schwetz v. Employees Ins. of Wassau, 166, 190
Scituate School Comm. v. Robert B., 130, 141
Scotchlas v. Board of School Directors of Haverford Township School Dist., 16, 61
Scott v. deLeon, 261
Seals v. Loftis, 132
Seastrunk v. Burns, 177
Seifert v. Lingleville Indep. School Dist., 20, 22
Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 264
Shaffer v. Heitner, 229
Shapell v. Humnoke School Dist. No. 5, 112
Shapiro v. Community School Dist., 6
Sharp v. Sinton Indep. School Dist., 183
Shearod v. Board of Coop. Educ. Servs., 26
Shepherd v. Brumback, 191
Shope Enters., Inc. v. Kent School Dist., 188
Shoreham-Wading River Cent. School Dist. v. Town of Brookhaven, 182, 222
Short v. Nevada Joint Union High School Dist., 23, 171
Shrewsbury v. Board of Educ., 74
Sibley v. Board of Supervisors, 191
Sides v. Duke Hosp., 257
Sidney N. Collier Memorial Vocational-Technical School v. Caufield, 21
Siegman v. Board of Educ., 178
Sigma Phi Society v. Rensselaer Fraternity Managers Ass'n, 193
Sigmon v. Board of Educ., Roane County, 75, 178
Signet Constr. Corp. v. Borg, 187
Siley v. Turnbull, 27
Simmons v. Camden County Bd. of Educ., 4
Simmons v. Sowela Technical Inst., 272
Simmons v. Vancouver School Dist. No. 37, 18
Sims v. Board of Trustees of N. Fla. Junior College, 256
Siu v. Johnson, 239
Skepton v. Borough of Northampton, 181
Smith v. Board of Educ., 17, 22
Smith v. Dorak-III School Dist., 23
Smith v. Duquesne Univ., 272
Smith v. Robinson, 111, 122, 134, 135, 136, 137, 138, 139, 143
Smith v. State Technical Inst. of Memphis, 254
Smith v. Steinberg, 158, 191, 275
Smith v. Wade, 100
Solmitz v. Maine School Admin. Dist. No. 59, 9, 104
Solomon v. School Comm., 31
Sowell's Meats and Servs. v. McSwain, 176
Spielberg v. Board of Regents, Univ. of Mich., 264
Spring Branch Indep. School Dist. v. Stamos, 86
Springer, *In re*, 265
Spurlock v. Board of Trustees, 17, 21
Spurlock v. Ely, 171
Stachura v. Truszkowski, 9, 13, 14
Stack v. Boonton Board of Educ., 168
Staheli v. University of Miss., 247
Stahl v. University of Wash., 244
Stana v. School Dist., 15
Stanford Univ. v. Superior Court, 193
Stark v. St. Cloud State Univ., 273
State v. Board of Educ., 25
State v. Board of Trustees, 177
State v. Budke, 77
State v. Jarchow, 179
State v. Jenness, 190
State v. Newstrom, 77
State v. Nickerson, 192
State v. Northern Bus Co., 178
State v. O'Neill, 194
State v. Perkins, 266
State v. Rollins, 190
State v. State Bd. of Educ., 184
State v. Viebranz, 177
State v. VanLare, 20
State Div. of Human Rights v. Leroy Cent. School Dist., 8
State *ex rel.* Citizens for Quality Educ. v. Gallagher, 178

State *ex rel.* Henry v. Board of Educ., Madison Plains Local Schools, 74
State *ex rel.* Lee v. Bellefontaine City Bd. of Educ., 32
Steelgard, Inc. v. Jannsen, 176
Stein v. Plainwell Community Schools, 100
Stensrud v. Mayville State College, 247
Stephenson v. School Bd. of Polk County, 150
Stevenson v. Lower Marion County School Dist. No. 3, 10
Stigliano v. St. Rose High School, 56, 61
Stitzer v. University of P.R., 252
Stock v. Massachusetts Hosp. School, 135, 136
Storey v. Board of Regents of Univ. of Wis. Sys., 242
Strand v. Special School Dist. No. 1, 26
Strange v. School Bd., 15, 19
Stuart v. Nappi, 136
Student Coalition for Peace v. Lower Merion School Dist., 101, 102, 189
Students of Cal. School for the Blind v. Honig, 140, 141
St. Charles Parish School Bd. v. Louisiana Power and Light Co., 182, 214
St. John the Baptist Parish Ass'n of Educators v. Brown, 41
St. Louis Developmental Disabilities Treatment Center Parents' Ass'n v. Mallory, 127
St. Paul Fire and Marine Ins. Co. v. Campbell County School Dist., 167
Supreme Court of New Hampshire v. Piper, 87
Swann v. Charlotte-Mecklenberg Bd. of Educ., 116
Swanson v. Board of Educ., 22
Swearinger v. Fall River Joint Unified School Dist., 161
Sweeney v. Special School Dist. No. 1, 15, 31
Sweet Home Cent. School Dist. v. Sweet Home Educ. Ass'n, 54
Swidryk v. St. Michael's Medical Center, 280

Takeall v. Ambach, 72
Tarleton State Univ. v. K.A. Sparks Contractor, 193
Tasby v. Black Coalition to Maximize Educ., 117
Tasby v. Wright, 117
Tate v. Board of Educ., 18
Tax Claim Bureau v. Chichester School Dist., 182
Teaford v. Howard, 178
Temple Univ. v. United States, 228
Texas A&M Univ. v. Gay Student Servs., 269
Texas A&M Univ. v. University Bookstore, 192
Texas Dep't of Community Affairs v. Burdine, 3
Texas State Teachers Ass'n v. Garland Indep. School Dist., 36, 189
Ten Hoeve v. Board of Educ., 8
Thiele v. Thiele, 266
Thigpen v. McDuffie County Bd. of Educ., 165, 190
Thomas v. Board of Trustees of Regional Community Colleges, 239
Thompkins v. Morris Brown College, 237
Three Village Teachers Ass'n v. Three Village Cent. School Dist., 47
Tinker v. Des Moines Indep. School Dist., 103
Tomaka v. Evans-Brant Cent. School Dist., 22
Tomiak v. Hamtramack School Dist., 27
Toney v. South Carolina Dep't of Educ., 166, 190
Torrence v. Oxford Mun. School Dist., 4
Town of Hooksett School Dist. v. W.R. Grace and Co., 186
Town of Lexington v. Massachusetts Comm'r of Educ., 84
Tracey T. v. McDaniel, 124
Trahan v. LaFayette Parish School Bd., 118, 179
Tri-Cities Children's Center v. Alameda County Bd. of Supervisors, 182
Tri-Village Publishers v. St. Johnsville Bd. of Educ., 177
Trident Tech. College v. Lucas & Stubbs, Ltd., 193
Trigg v. Fort Wayne Community Schools, 3
Trotman v. Board of Trustees of Lincoln Univ., 250
Trotter v. Los Angeles County Bd. of Educ., 20
Trotz v. Pennsylvania State Employees' Retirement Bd., 255
Trout v. Umatilla County School Dist., 169
Trower v. Maple, 80
Troyan v. Riverhead Cent. School Dist., 149
Truby v. Broadwater, 86

Truney v. Marion County Bd. of Educ., 183
Trustees of Columbia Univ. v. James, 193, 278
Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs., 193, 277
Trustees of Rowan Technical College v. J. Hyatt Hammond Assoc., Inc., 193, 277
Tucker v. Board of Educ., 22
Tucker v. Roach, 23
Tully v. Orr, 270
Turner v. Barber-Scotia College, 233
Turnquist v. Employment Div., 254
Tyson v. Hess, 28

Unified School Dist. No. 490 v. Board of County Comm'rs, 182
Unionville-Chadds Ford School Dist. v. Rotteveal, 85
United Bldg. and Constr. Trades of Camden County v. Mayor and Council of Camden, 87
United Mine Workers v. Barnes & Tucker Co., 56
United States Fire Ins. v. Gentile, 194
United States v. Alabama, 192
United States v. Board of Educ., City of Chicago, 113
United States v. Gibson, 266
United States v. Lawrence County School Dist., 118, 178
United States v. Massachusetts Maritime Academy, 262
United States v. Mississippi, 118, 178
United States v. Posner, 194
United Steelworkers v. Weber, 5
United Teachers of Dade FEA/United, AFT Local 1974 v. Dade County School Bd., 67
Universidad Cent. De Bayamon v. NLRB, 258
University Interscholastic League v. North Dallas Chamber of Commerce Soccer Ass'n, 88
University of Cal. Regents v. Bakke, 82
University of Ga. Athletic Ass'n v. Laite, 192, 283
University of Mont. v. Coe, 266
University of Pa. v. Pennsylvania Pub. Util. Comm'n, 193
University of Tex. at Austin v. NCAA, 192
University of Tex. at El Paso v. Nava, 194
Upper Bucks County Area Vocational-Technical School Joint Comm. v. Upper Bucks County Vocational-Technical Educ. Ass'n, 64
Upshur County Comm'rs Court v. Central Educ. Agency, 179
Usher v. Upper Saint Clair School Dist., 162
Uzzell v. Friday, 273

Valero Transmission Co. v. Hays Consol. Indep. School Dist., 183
Valez v. Our Lady of Victory Church, 153
Van Duyne v. City of Crest Hill, 180
Vaughns v. Board of Educ. of Prince George's County, 119, 121
Vermilion Parish School Bd. v. Weaver Exploration Co., 176
Vettleson v. Special School Dist. No. 1, 24
Vielle v. Reorganized School Dist. No. R-1, 22
Vince v. Ringgold School Dist., 161, 190
Visionquest Nat'l, Ltd. v. Pima County Bd. of Adjustment Dist. No. 1, 180
Vlandis v. Kline, 70, 71
Voorhies v. Conroe Indep. School Dist., 173
Vythoulkas v. Vanderbilt Univ. Hosp., 192

Wagenblast v. Crook County School Dist., 21
Wagner v. Nova Univ., 194
Walgenbach, *In re*, 215
Walker v. Board of Assessors, 182, 220
Wallace v. Alabama Ass'n of Classified School Employees, 43
Wallace v. Jaffree, 96, 97
Walter v. North Hills School Dist., 29
Walter v. West Va. Bd. of Educ., 97
Walters v. President and Fellows of Harvard College, 242
Wamble v. Bell, 199
Ward v. Board of Educ., 18
Ward v. Washington State Univ., 263
Warren Educ. Ass'n v. Warren City Bd. of Educ., 59
Warrior Hinkle, Inc. v. Andalusia City School Bd., 187
Washington County Bd. of Educ. v. MarketAmerica, Inc., 176
Washington Higher Educ. Facilities Auth. v. Gardner, 193, 230
Washington v. Davis, 82
Wastvedt v. State, 254
Watertown Firefighters Local 1347 v. Watertown, 61

Waterloo Educ. Ass'n v. Waterloo Community School Dist., 51
Watrel v. Pennsylvania Dep't of Educ., 255
Wayne Highlands Educ. Ass'n v. Wayne Highlands School Dist., 58
Wayne Highlands School Dist. v. Pennsylvania Dep't of Educ., 74
Weidman v. Brandon School Dist., 27
Wessell Bros. Found. Drilling Co. v. Crossett Pub. School Dist. No. 52, 188
Wessely v. Carrolton School Dist., 23
West Virginia v. Joseph T., 93
Western Line Consol. School Dist. v. City of Greenville, 179
Western Reserve Academy v. United States, 228
W.H. Hopper & Assocs. v. DeSoto County, 181
Wharton v. Abbeville School Dist. No. 60, 118
White Mountains Educ. Ass'n, *In re*, 62
Whitlock v. University of Denver, 194
Whittenberg v. School Dist. of Greenville County, 119, 179
Wichert v. Walter, 10
Widmar v. Vincent, 101, 102
Wiggins, v. Creary, 192
Wiley v. Richland Parish School Bd., 18
Wilkerson v. School Dist. No. 15, 27
William G., *In re*, 91, 92
Williams v. Board of Educ., 22
Williams v. Salerno, 264
Wilson Area Educ. Ass'n v. Wilson Area School Dist., 57, 61
Wilson v. Commonwealth, 19
Winthrop Univ. Hosp. *In re*, 192
Wistuber v. Paradise Valley Unified School Dist., 224
Wong v. Hayakawa, 269
Woodard v. Wabbaseka-Tucker Pub. School Dist., 25
Wren v. McDowell County Bd. of Educ., 29
Wright v. Board of Educ. 31, 79
Wright v. Council of City of Emporia, 116
Wyche v. Madison Parish Police Jury, 177
Wygant v. Victor Valley Joint Union High School Dist., 28
Wyoming Valley W. Educ. Ass'n v. Wyoming Valley W. School Dist., 55

Yale Literary Magazine v. Yale Univ., 192, 278
Yamamoto v. Sunn, 266
Yaw v. Walla Walla School Dist., 57
Yehudi v. Assessor of Ramapo, 182
Yonts v. Commonwealth, 177
York v. Board of School Comm'rs, 21
Young, *Ex parte*, 113, 139

Zangrillo v. Fashion Inst. of Technology, 240
Zewde v. Elgin Community College, 240
Ziccardi v. School Dist., 162, 190
Zimmerman v. Board of Educ., 14

INDEX

ability grouping, 110
academic dismissal—see dismissal
academic freedom, 9, 104, 250
academic privilege, 246
accreditation, 176, 192, 232, 238, 244
accrediting agency, 228
actual loss, 147
administrative review, 222
admission, 143, 261, 262, 270
advancement of religion—see constitutional rights
affirmative action plan, 238
age discrimination—see discrimination; Age Discrimination in Employment Act
Age Discrimination in Employment Act of 1975 (ADEA), 2, 7, 66, 67, 238, 242
agency fee, 52
agency shop, 37, 258
Aid to Families with Dependent Children (AFDC), 266
airport, 183
alcoholic beverage, 154, 274
  Battlin' Bulldog Beer, 283
alcoholism, 20
aliens/alienage, 7, 70, 71
amateur status, 282
American Association of University Professors (AAUP), 251
American Civil Liberties Union, 167
American Rule, 136
Amish exception, 76
annexation/disannexation, 179, 193, 216
annual review, 210
antitrust, 192, 281, 282, 283
apportionment plan, 202
aptitude, 123
arrest, 244
asbestos, 186
assault/battery, 81, 106, 161, 190
assumption of risk, 154, 162, 163
attachment and detachment, 179
attorney fees, 21, 70, 98, 103, 119, 120, 122, 134, 135, 136, 137, 138, 143, 167, 188, 208, 210, 217, 224, 235, 239, 273
  contingency fee, 121
  risk enhancement, 121
  novel claims, 121

back pay, 7, 10, 28, 29, 235, 237, 239, 257
bad faith, 107, 128, 134, 136, 188, 210, 211
Balanced Treatment Act, 98
balancing test, 91
bankruptcy
  Chapter 7, 265
  Chapter 11, 186
  Code, 265
bartending job, 27
basic skills, 156
benefits, 14, 37, 60, 61, 254, 255, 257, 273, 276
  death, 276
  fringe, 42, 227
BEOG—see financial aid, Pell Grant
Bible/Bible club, 98
bid, 176, 177
  bond, 185
  competitive, 185
  low, 185
bilingual/bicultural, 82
blindfolded, 151
board of equalization, 218
Board of Cooperative Education Services (BOCES), 136, 137
bomb threats, 9
bona fide occupational qualification age, 8
bonding authority, 230
bonds, 193, 215, 216, 229, 230
  capital outlay, 184
  election, 183
  resolution, 225
  surety, 185, 187
  tax increment, 184
breach of contract, 27, 28, 59, 147, 171, 172, 188, 232, 236, 245, 247, 248, 253, 263, 271, 272, 277, 278, 279
breach of duty, 147, 151, 153
breach of warranty theory, 173
bump, 24, 25, 45, 46
burden/burden of proof, 3, 32, 62, 119, 124, 144, 163, 172, 181, 224, 254, 270
Bureau of Special Education Appeals (BSEA), 128, 129
burglary, 190
burn, 165, 275
bus/busing/bus drivers, 12, 15, 20, 52, 73, 74, 75, 113, 114, 116, 119, 152, 166, 167, 178, 180, 200
business necessity, 7, 67
"but for" test, 172

call-back rights, 22, 26, 27
cartoon, 167, 170
Catch 22, 95
catheterization, 138
cause of action, 102, 156, 160, 173, 243, 253, 262, 272
cause of injury, 276
certification/decertification, 14, 22, 24, 30, 32
certification of completion, 185
change in placement, 124, 129, 130, 133, 136, 142
cheating, 227, 269, 270
child abuse, 18, 159
Civil Rights Act of 1866
  section 1981, 3
Civil Rights Act of 1871
  section 1983, 7, 72, 89, 93, 100, 104, 135, 136, 137, 173
Civil Rights Act of 1964, 2
  title VI, 82, 110, 233
  title VII, 2, 3, 5, 6, 7, 66, 137, 227, 232, 233, 235, 236, 237, 238, 239, 240, 241, 260
Civil Rights Attorney's Fees Act, section 1988, 119, 120, 121
claim of entitlement, 14
code of conduct, 116
collective bargaining/collective bargaining agreement, 24, 34-68, 223, 224, 246, 258, 259, 260
common law, 44, 157, 274
community education program, 94, 95, 195, 196, 197
comparable work, 240
comparative negligence—see tort, negligence
compelling state interest, 12, 38, 65, 102, 203, 208, 268
compensation rate, 168
compulsory attendance, 70, 75, 76, 77, 79, 80
confidential information, 245
consolidation, 22, 114, 118
constitutional rights
  association, 8, 11, 36, 42, 253
  expression, 36, 109, 268
  petition, 9
  privacy, 8, 12
  religion, 8, 11, 38, 69, 76
  speech, 8, 9, 11, 36, 102, 103, 245, 249, 250, 261, 267, 268
Consumer Protection Act, 279
contempt, 81
contributory negligence—see tort, negligence
control of students, 18
corporal punishment, 18, 109, 112, 168
cost-of-living increase, 29
course syllabi, 248
creation-science, 99
criminal conspiracy, 170
curriculum, 9, 75, 76, 78, 79, 104, 105, 279

dance/dancing, 103, 166, 189
deceptive practices, 176, 192, 227, 279
defamation—see tort, intentional
degree/diploma, 59, 136, 191, 232, 234, 238, 244, 269, 272
demotion, 20, 22, 31
denial of employee privileges, 252
Department of Agriculture, United States, 222
Department of Education, United States, 266, 267
Department of Labor, Division of Workman's Compensation, 168
Department of Welfare, United States, 58
desegregation, segregation, integration, 70, 82, 110-21, 178, 179
  cross-district remedies, 112
  higher education, 192
  plan oversight, 115
  systemwide remedies, 112
  unitary status, 70, 110, 115, 116, 118, 119, 121
devil worship, 99
diploma—see degree
directory, 209
disclaimer, 283
discovery, 16
discretionary, 152, 159
discrimination
  age, 2, 66, 67, 243
  alienage, 7
  color, 2, 66
  employment, 232
  handicap, 8
  national origin, 2, 7, 66, 237, 238
  race, 2, 3, 4, 5, 6, 66, 233, 237, 252, 262, 273
  religion, 2, 5, 6, 66
  reverse, 5, 240, 241
  sex, 2, 4, 6, 66, 236, 237, 238, 240, 244, 247, 253, 261, 262
disease, 276
  contagious, 8, 123, 144
  Crohn's, 143
  tuberculosis, 8, 144
dismissal, 10, 12, 15, 17, 20, 21, 29, 259, 260
  academic, 227, 272

disparate impact/discriminatory impact, 2, 3, 66, 67, 110, 112, 233, 238
disparate treatment/discriminatory treatment, 2, 66, 233, 234, 238, 239
disruption/disruptive, 10, 36, 103, 125
diving accident, 162, 163
divorce, 12, 254
doctrine of adverse possession, 179
donkey basketball game, 163
dormitories—see residence halls
Dover Amendment, 231
draft, 264
dress code, 91
drowning, 161
drugs/narcotics, 105, 134, 273, 275
  cocaine, 92
  marijuana, 90, 92, 93, 187
  speed, 108
dual rights, 26
due process clause—see fourteenth amendment
duty of care, 147, 151, 153, 155, 157, 158, 162, 274, 275
duty to bargain, 44
duty-risk analysis, 155

earmarked for education, 266
Education Consolidation and Improvement Act of 1981, 95
Education for All Handicapped Children Act of 1975 (P.L. 94-142), 111, 123, 124, 125, 127, 128, 129, 130, 132, 133, 134, 135, 136, 137, 138, 140, 141, 142, 143, 206, 207, 210
  section 1415/procedural safeguards, 124, 128, 129, 130, 134, 135, 137, 142
  stay put/status quo, 123, 124, 128, 130, 210
Education Amendments of 1972
  title VI, 89
  title IX, 232, 242, 261, 262
Education Amendments of 1976
  title II, 212
Educational Testing Services (ETS), 263
elections, 112, 177
Elementary and Secondary Education Act of 1965
  amendments (1978), 211
  title I, 30, 95, 195, 198, 211, 212
    bypass provision, 199
eleventh amendment, 82, 113, 114, 123, 138, 139, 140, 141, 145, 175, 213, 236, 273
eligibility rules, 227, 281
  academic, 86
  age, 281
  professional status, 282
  residency, 87, 88
elimination of position, 23
emergency evacuation planning, 176
eminent domain, 180
emotional distress, 156, 167, 170, 171
employment
  compensation, 5
  conditions, 5, 41, 45, 46, 50, 53, 60
  privileges, 5
  terms of, 5
environment, 153, 231
Equal Access Act, 101, 102, 189
equal educational opportunity, 202
Equal Educational Opportunities Act of 1974 (EEOA), 82, 110
Equal Employment Opportunity Commission (EEOC), 43, 44, 242, 246
Equal Pay Act (EPA), 223, 240, 241
equal protection clause—see fourteenth amendment
equalized formula, 213
equity capital formula, 218
equivalent instruction, 76, 77, 78, 79
essence test, 55, 57
establishment clause—see first amendment
estimate of need, 218
estoppel, 72
evaluation, 10, 15, 22, 28, 123, 128, 132, 133
evolution, 99
excessive entanglement—see first amendment, establishment clause
exclusion, 70, 72, 105
exclusionary rule—see search and seizure
exclusive representation, 37
executive order, 195, 203, 204
exhaustion of remedies, 3, 125, 126, 131, 170, 219
expenditures per pupil, 201
experience, 24, 25, 28, 234, 241
expulsion/expel, 85, 93, 108, 132, 133, 134, 136, 207, 270

facially neutral, 67, 234
fact-finders, 59, 60, 62
failure to control students, 19
failure to promote, 20, 22
Fair Labor Standards Act, 241
fair representation, 43, 44
fair share agreements, 36
false advertising, 279
Families for Home Education, 77
Family Educational Rights and Privacy Act, 272

Federal Bureau of Investigation, 274
federal financial assistance, 135, 143, 242
federal impact aid, 8, 213, 214
Federal Insurance Contribution Act (FICA), 228
federalism, 139
fees
  activity, 74
  authorization ordinance, 181
  building permit, 181
  compulsory, 268
  facilities, 181
  recovery of, 192
  school impact, 181
  service, 37
field trip, 161
fifty dollar rule, 214
financial aid, 227, 261, 264, 266, 273
  grant-in-aid, 279
  HELP grant, 279
  National Direct Student Loan (NDSL), 264, 279
  Pell grant/(BEOG), 266, 279
  Solomon amendment, 264
  student loans, 264, 265, 266, 267
financial disclosure, 176
financial exigencies, 242, 253, 259
fire/explosion, 149, 159, 160
first amendment, 36, 37, 66, 69, 76, 80, 88, 99, 101, 102, 103, 104, 195, 200, 232, 244, 245, 249, 250, 258, 267, 268, 278
  establishment clause, 11, 12, 38, 89, 196, 258, 273
    advance nor inhibit, 94, 96, 197, 273
    excessive entanglement, 94, 95, 100, 197, 198, 199, 200, 273
    secular legislative purpose, 94, 96, 97, 197, 273
  free exercise clause, 84, 85, 201, 258, 268
  indoctrinate, 197
  neutrality, 197, 200
  surveillance, 200
  tri-partite test, 94, 197
food stamp allotment, 266
forced retirement, 8
foreseeability, 151, 153, 163, 275
forgery, 266, 267, 281
forums
  limited, 9, 36, 101, 102
  nonpublic, 36
  public, 36, 102, 103, 104, 189, 245
foundation program, 203, 204
Four-H Club, 233
fourteenth amendment, 82, 110, 173, 229, 231, 273
  due process, 8, 12, 13, 15, 16, 17, 21, 23, 26, 27, 28, 29, 71, 72, 77, 78, 86, 89, 105, 106, 107, 123, 124, 134, 135, 136, 137, 187, 207, 208, 213, 229, 231, 232, 239, 243, 246, 248, 249, 250, 251, 252, 254, 256, 257, 263, 264, 265, 269, 270, 271, 272, 281
  liberty right, 12, 13, 14, 173, 246, 248, 251, 253, 282
  life, 13
  property right, 13, 14, 15, 23, 206, 243, 246, 248, 252, 253, 256, 257, 271, 272, 282
  equal protection clause, 2, 5, 36, 65, 71, 74, 76, 84, 86, 88, 89, 135, 140, 177, 181, 201, 207, 213, 231, 244, 256, 264, 272, 273, 281
  strict scrutiny, 202
  rational relationship/rational basis, 73, 85, 86, 87, 106, 201, 203, 222
fourth amendment, 70, 90, 93
Framers, 197
fraud, 186, 225, 266, 270
free appropriate education, 129, 130, 132, 135, 140, 206, 208
free exercise clause—see first amendment
free rider test, 37
freedom of association—see constitutional rights
freedom of petition—see constitutional rights
freedom of religion—see constitutional rights
freedom of speech—see constitutional rights
fundamental right, 86, 87, 203
fundamentalist Christian, 75, 98

gay rights, 227, 261, 268, 269
General Education Provisions Act (GEPA), 214
good faith, 25, 26, 48, 169, 185, 259
governmental function, 157
governmental immunity—see immunity
grades/grade inflation, 105, 250, 258, 270, 272
graduation, 264
grant-in-aid—see financial aid
grants, categorical, 202, 203
grievance, 10, 35, 37, 39, 41, 47, 50, 51, 52, 54, 55, 56, 59, 61, 66, 67, 169, 251
grooming rules, 89
guaranteed tax base plan, 202

guardian/guardianship, 70, 71, 74, 124, 158

handicap discrimination—see discrimination
handwriting, 263
harassment, 153, 156, 167
helmets, 172, 173
HELP grant—see financial aid
highest bidder, 227
home instruction, 69, 75, 77, 78, 79, 80, 133
homosexual/gay/lesbian, 9, 103, 104
Human Rights Act, 268
hypnosis, 16

idol worship, 99
illegal subject of bargaining—see topics of bargaining
immorality, 17, 19, 29
immunity, 107, 140, 141, 150, 152, 154, 158, 161, 229, 235, 236, 278
  governmental, 157, 159, 160, 161, 162, 165, 187
  sovereign, 139, 145, 153, 157, 165, 175, 275, 283
impasse, 59 60, 64, 259
impressionable students, 95
in loco parentis, 155
indemnification, 28
indemnity, 167, 186, 188
independent evaluation, 128
indirect and incidental effect, 38
individualized education program (IEP), 123, 125, 126, 129, 130, 133, 137, 210
inherent managerial prerogative, 53, 54
inhibiting religion—see first amendment, establishment clause
insubordination, 10, 17, 18, 22, 171, 257, 260
insurance coverage, 59, 64, 132, 133, 164, 165, 166, 167, 176, 255, 276
intellectual development, 127
intentional interference with contractual relations, 171
intentional tort—see tort
Internal Revenue Code, 255
involuntary leaves of absence—see leaves
irrebuttable presumption, 70, 71
irreparable harm, 131, 270

job action, 65
job relatedness, 3
job security, 47, 61

knife fight, 16

laches, 209
Lanham Act, 283
Learning Tree, The, 98
lease, 278
least restrictive environment (LRE), 127
leaves, 6, 27, 28, 67, 279
  involuntary, 22, 24, 61
  extended, 24
  maternity, 31, 255
  religious, 5
  sabbatical, 24, 29
  sick, 18, 46
legislative history, 140
liability, 9, 72, 111, 114, 148, 150, 151, 152, 154, 155, 156, 157, 158, 160, 161, 163, 164, 165, 167, 169, 170, 171, 211, 216, 217, 225, 227, 229, 254, 274, 275
  contract, 277
  joint, 188
  products, 172, 186
  several, 188
  strict, 186
libel—see tort, intentional, defamation
liberty right—see fourteenth amendment, due process
license/licensure, 24, 25, 40, 187, 191, 231, 232, 244, 267
life—see fourteenth amendment, due process
likelihood of success on the merits, 270
lock out, 63, 64
LSAT, 262
lunch program, 222

magnet schools, 113, 114, 118, 178, 179
mainstreaming—see placement
major life activities, 144
make whole objective, 239
malice, 109, 169, 170, 188
malpractice
  athletic officials, 280
  educational, 155, 156, 227, 280
  medical, 191, 257, 275, 280
management prerogatives, 54
mandatory, 102, 209, 219
mandatory topics of bargaining—see topics of bargaining
marital status, 12
market value of property, 217, 234, 241
Master Teacher Program, 67
maternity policy, 28
maximum development, 130, 131, 141
mediation, 39, 57, 62, 64, 200
medication, 8

meditation—see prayer
mental anguish, 6
mental distress, 112
migrant farm workers, 177
minimum standards, 232
ministerial acts, 159, 160
minority representation, 272
misrepresentation of facts, 84, 245, 279, 283
moment of silence—see prayer
monkey, 170
moral turpitude, 19, 249 251
motivating factor, 11

name change, 228
national defense, 261
National Direct Student Loan (NDSL)—see financial aid
National Guard, 263
National Health Planning and Resources Act of 1974, 231
National Labor Relations Act (NLRA), 46, 56
National Labor Relations Board (NLRB), 172, 258
national origin discrimination—see discrimination
NCAA regulations/sanctions, 281
neglect of duty, 18, 251
negligent tort—see tort
newspaper, 104, 167, 171, 228, 230, 268, 279
ninth amendment, 88
nonrenewal, 17, 20, 21, 22, 28, 29, 245, 247, 256, 260
nuclear power facility, 176
nudity, 180
nuisance, 186

objective job criteria, 4
obscene, 103, 109
Office of Education, United States, 211
open meetings law, 106, 192, 230
opportunity to be heard, 17
oral contract, 27
otherwise qualified handicapped individual, 2, 8, 143, 144, 244, 262
outside earnings, 258
overbreadth and vagueness doctrine, 36

paid under protest, 218
Parent Teacher Association (PTA), 105
parental consent, 125, 133
parking
  ordinance, 181
  violations, 269
past practice, 41, 42, 50
payment in lieu of taxes—see tax
patents, 191
Pell grant—see financial aid
permissive topics of bargaining—see topics of bargaining
petition, 216
physical abuse, 18
physical education, 126
physical or mental impairment, 144
picketing and leafleting, 35, 38, 66
placement, 109, 111, 119, 126, 136, 137
  appropriate/proper, 128, 129, 130, 131, 142
  approved, 126
  current/existing, 125, 127, 128, 129
  interim, 131
  mainstream, 127, 151
  private, 123, 124, 125, 128, 129, 130, 131, 132, 206, 208, 209, 210
  proposed, 128
  regular, 127
  residential, 125, 131, 132
  unilateral, 123, 124, 128, 129, 130, 210
plagiarism, 270
polygraph, 16
prayer, 11, 94, 96, 97, 98, 99, 100, 101
  meditation, 94, 96, 97
  meetings, 189
  moment of silence, 69, 94, 96, 97
pregnancy, 6, 67, 104
preponderance of evidence, 3, 4, 131, 144, 217
prevailing party, 136, 188, 239
prevailing wage, 185
prison, 191, 228, 273
privacy—see search and seizure
privileges and immunities clause, 87
probability of success on the merits, 131
probable cause standard—see search and seizure
probation, 169
probationary period, 30, 31
products liability—see liability
program elimination, 253
prohibited topics of bargaining—see topics of bargaining
property right—see fourteenth amendment, due process
property sales and leases, 183
Proposition 2½, 83
protected classes, 234
proximate cause of injury, 147, 148, 149, 151, 152, 153, 157, 159, 162, 163, 280

Public Law 94-142—see Education for All Handicapped Children Act of 1975
public nuisance, 181
public persons, 170
public policy, 47, 48, 49, 50, 54, 57, 224, 256, 268, 280, 283
public works project, 185
purchasing power, 229

race discrimination—see discrimination
racial quota, 238
racist, 250
rape—see sexual assault
rational relationship/rational basis—see fourteenth amendment, equal protection clause
real estate 161, 181
real property, 152, 161, 162, 179, 216, 220, 222
realignment, 24, 25, 26
reasonable accommodation, 8
reasonable and prudent professional, 148
reasonable care, 126, 149, 151, 162
reasonable suspicion standard—see search and seizure
recall provision, 61
reclassification, 22
record keeping, 18, 120
record of such an impairment, 144
records, 253
  confidential, 246
  falsification of, 33, 260
  microfilm, 230
  open, 192
recruitment, 87, 229, 262, 282
reduction-in-force (RIF), 22, 23, 51
referendum, 41
regression, 131
Rehabilitation Act of 1973, 137, 138, 139, 140, 208, 233, 243, 262
  section 504, 2, 8, 110, 111, 135, 136, 143, 144, 145, 207
reimbursement, 123, 124, 126, 128, 129, 130, 132, 134, 206, 207, 208, 209, 210, 212, 213, 222, 225
reinstatement, 239
related services, 132
religious discrimination—see discrimination
religious meetings, 9
remediable teaching deficiency, 18
reorganization, 22
reprimand, 20, 22, 48, 49, 169
reputation, 14, 169
residence halls/dormitories, 231, 232, 282, 283
resident/residency, 70, 71, 72, 74, 77, 78, 83, 212, 217, 282
resign to run statute, 177
resignation, 12, 21, 27, 28, 121, 252, 253, 254, 257
resource specialist, 210
retainage fund, 188
retirement, 21, 254, 255
  annuities, 228
  benefits, 259
reverse discrimination—see discrimination
risk, 153, 155, 274
rollback provision, 218
sabbatical leave—see leaves
safety, 133, 148, 149, 151, 152, 153, 166, 173, 180
search and seizure, 70, 90-93
  exclusionary rule, 90, 92
  probable cause standard, 90, 91, 93
  reasonable suspicion standard, 90, 91, 92, 93
  right to privacy, 92, 106
  two-prong test, 92
secretary of education, 211, 212, 213, 214
section 1415—see Education for All Handicapped Children Act of 1975
section 1981—see Civil Rights Act of 1866
section 1983—see Civil Rights Act of 1871
section 1988—see Civil Rights Attorney's Fees Act
secular humanism, 98
secular legislative purpose—see first amendment, establishment clause
security department, 171, 172
seismic safety/testing, 141, 191
severance pay, 46
sewer user charges, 184, 221, 222
sex discrimination—see discrimination
sexual assault/molestation/rape, 18, 151, 153, 155, 167, 190, 275
sexual harassment/activity/advances/remarks, 9, 18, 20, 227, 232, 233, 249, 251, 260, 261, 272
sexual relations/misconduct, 15, 19, 33
sexual reproduction, 9
shared time, 94, 95, 195, 196, 197
shoplifting, 81
sick leave policy—see leaves
sickout, 65, 68
sign language, 131
Social Security Act, 222
social security number, 265
Socialist Workers Party, 268
solicitation, 229, 268, 278

Solomon amendment—see financial aid
speech—see constitutional rights
standard of care, 147, 148, 149, 157, 274, 275
standard of proof, 227
state action, 281
statute of limitations, 43, 44, 142, 164, 165, 185, 186, 249, 255, 278
stay put/status quo—see Education for All Handicapped Children Act of 1975
strict liability—see tort
stigma, 127, 246, 252
strike, 64, 65, 223
student loans—see financial aid
substantial evidence, 6
summer program, 209
sunshine laws, 230
supervision/supervisory, 11, 31, 39, 70, 148, 149, 150, 151, 152, 156, 158, 161, 166, 198, 274, 275, 280
suppression of ideas, 105
supremacy clause, 231
surplus revenue, 204
suspension
  employee, 20, 22, 256, 260
  student, 92, 103, 105, 106, 107, 109, 133, 270
swamp land, 160
sweepstakes, 204, 205

tardiness, 18
tariffs, 191
tax
  allocation, 182
  apportionment, 182
  authority, 228
  collection of, 219
  default in payment of, 222
  delinquent, 216, 217
  erroneously paid, 221
  exempt status, 230
  exemption, 170, 182, 216, 219, 220
  homestead exemption, 217
  income, 228
  levy, 182, 216, 220, 222
  occupation, 219
  payments in lieu of, 220, 221
  property, 182, 192, 216, 218, 221, 222
  recovery of, 218
  referendum, 182
  sales, 228, 230
teacher assignment, 10
teacher-student ratio, 150
testing, 109, 117, 123, 131, 133, 262, 263, 271, 272
textbooks, 84, 98, 99
theft, 19, 108, 225
thorough and efficient clause, 201
title I—see Elementary and Secondary Education Act of 1965
title II—see Education Amendments of 1976
title VI—see Civil Rights Act of 1964
title VII—see Civil Rights Act of 1964
title IX—see Education Amendments of 1972
title to waters, 175
tolling, 239, 240
topics of bargaining
  illegal, 62
  mandatory, 38, 45, 46, 60, 61
  permissive, 46
  prohibited, 46
tort, 100, 146-73, 236, 274, 278, 280
  constitutional, 173
  intentional, 147
    defamation, 169, 170, 191, 245, 246, 248, 274
    libel, 278
  negligence, 32, 126, 147, 148, 150, 151, 152, 153, 154, 156, 157, 158, 159, 160, 161, 162, 164, 165, 172, 173, 186, 274, 275, 281
    comparative, 148, 162, 163
    contributory, 154, 162, 281
    Tort Claims Act, 156, 157, 160, 161
    vicarious liability, 260
    willful act, 155
tortious interference with a contract, 170, 171
trademark/name, 192, 278
transfer
  teachers, 10, 11, 20, 21, 22, 23, 29, 30, 31, 32, 39
  students, 112, 116
transportation, 70, 74, 75, 83, 84, 85, 115, 118, 166, 178, 200, 201, 202, 203
Treasury Department, United States, 267
trespass/trespasser, 162, 163, 186, 190
truancy/truant, 77, 78, 81
trust/trust lands, 175, 183, 191, 229
tuberculosis—see disease
tuition, 70, 71, 73, 123, 125, 128, 130, 228, 279
  nonresident, 227, 261, 263
two-prong test—see search and seizure

under protest, 214
undue hardship/hardship, 6, 73, 265
unemployment compensation, 63, 64, 254, 255
unfair labor practices, 258, 259

unfitness, 17, 18
unilateral placement—see placement
union activities, 11, 38
union dues, 37, 42, 52, 258
union shop, 37
unitary status—see desegregation
United Nations Charter, 109, 168
United States Attorney General, 261
unnecessary use of force, 18
unprofessional conduct, 17, 18
use of school facilities, 69
utilities, 183, 187, 214

vandalism, 107
verbal abuse, 156
veterans, 273
vicarious liability—see tort
voting rights/votes, 97, 100, 177, 184, 216, 225, 238, 264
vulgar and profane language, 18

wages, 168
Washington Post, 245
welfare benefits, 266
white flight, 118
willful and wanton conduct, 150
willful neglect of duty, 17, 18
witchcraft, 99
work-share agreement, 236
work stoppage, 64, 65
Workmen's Compensation Appeals Board, 276
worker's compensation, 168, 190, 275, 276
working cash fund, 215

Yale University Magazine, The, 278
Young Socialist Alliance, 268

zoning/rezoning, 118, 227, 230, 231